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Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California

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I. INTRODUCTION

Public policy, or "ordre public" in continental jurisprudence, is an elusive concept that seems to suffer from certain inherent weaknesses.[1] From its inception, public policy appears to have constantly defied all attempts at precise definition.[2] It is vague, nebulous,

1. The concept of public policy appears in most treatises and casebooks dealing with contracts and conflict of laws. *See, e.g.*, B. CARDOZO, THE GROWTH OF THE LAW 67 (1924); J. CHITTY, 1 CHITTY ON CONTRACTS 546 (25th ed. 1983) [hereinafter CHITTY ON CONTRACTS]; E. FARNSWORTH, CONTRACTS 330 (1982) [hereinafter FARNSWORTH]; G. CHESCHIRE & P. NORTH, CHESCHIRE & NORTH'S PRIVATE INTERNATIONAL LAW 130 (1987) [hereinafter CHESCHIRE & NORTH]; A. EHRENZWEIG, CONFLICT OF LAWS 131 (1959) [hereinafter EHRENZWEIG]; A. DICEY, CONFLICT OF LAWS (1986) [hereinafter DICEY]; R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS, CASES - COMMENTS - QUESTIONS (1987) [hereinafter CRAMTON, CURRIE & KAY]; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 82 (2d ed. 1980) [hereinafter WEINTRAUB]; J. BEALE, CONFLICT OF LAWS § 612.1 (1935) [hereinafter BEALE]; H. READ, 2 RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE COMMON LAW UNITS OF THE BRITISH COMMONWEALTH 288 (1938); Husserl, *Public Policy and Ordre Public*, 25 VA. L. REV. 37 (1939) [hereinafter Husserl]; Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 183-84 (1933); Kosters, *Public Policy in Private International Law*, 29 YALE L.J. 745, 746 (1920); Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196 (1935); Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087 (1956).

2. Fewer concepts have evoked greater judicial and intellectual attention than public policy in terms of meaning. A valuable historical review of the evaluation of the meaning of public policy can be found in an article by Winfield. *See* Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76 (1929) [hereinafter Winfield]. *See also* F. POLLOCK, PRINCIPLES OF ENGLISH LAW 379-441 (9th ed. 1921) [hereinafter POLLOCK]; W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 377 (3d ed. 1923) [hereinafter HOLDSWORTH]; Knight, *Public Policy in English Law*, 38 L.Q. REV. 207 (1922) [hereinafter Knight] (all discussing meaning of public policy). The elusiveness of public policy in the United States can be found in another valuable article by Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 972-80 (1956) [hereinafter Paulsen & Sovern].

intractable, and lacks meaningful and consistent contours that can guide its definition and application.[3] Like a chameleon, it seems to be seriously influenced by its environment, surrounding circumstances, and the purposes for its use.[4] It, therefore, takes on an incessant variety of colors depending on the situation at hand. According to Judge Goodrich, it is like the ghost of Banquo which slips in when least expected.[5]

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3. The fluidity of the concept has been noted by almost anyone who has thought seriously about it. According to Chitty it is open-textured, flexible, vague, unsatisfactory, and a treacherous ground for decision. CHITTY ON CONTRACTS, *supra* note 1, at 546. Winfield also discussed the various meanings of public policy under English common law. *See* Winfield, *supra* note 2. *See also* Holdsworth, *supra* note 2; POLLOCK, *supra* note 2; and Knight, *supra* note 2 (all discussing various meanings of public policy); and the landmark case of Mitchel v. Reynolds, [1711] 24 Eng. Rep. 347, 348. In the Duke of Norfolk's Case, [1681] 22 Eng. Rep. 931, 960, 3 Ch. 1, 20, Lord Nottingham dealt with the ever changing nature of public policy in the following statement: "Where will you stop, if you stop, if you do not stop here? . . . I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear." *Id.*

4. *See, e.g.*, Winfield's discussion of the changing views of religious toleration, restraint of trade and political morality. The following passage bears testimony to the variability of the concept over time:

> As to the variability of public policy with regard to the same branch of the law, the illustrations are legion. The stock example is restraint of trade. In this field many decisions barely fifty years old are now museums of fossil economic theories. One hundred and thirty years ago current views on religion led to the condemnation of Paine's Age of Reason as a blasphemous libel, because any attack on Christianity was to be regarded as illegal. Sixty years ago the frustration of a ball and tea party in memory of the author was compensated by one farthing damages. Ten years ago, the House of Lords held that a denial of Christianity was not blasphemous, apart from scurrility or profanity. Here public policy had broadened legal views in religious toleration. Now take an example where it has narrowed them in political morality. In James I's reign, a baronetcy might be purchased for $1095, subject to safeguards which may or may not have been observed. Nowadays, an agreement with the secretary of a charity by which he undertakes to procure a knighthood for the donor of a large sum of money is so objectionable that the donor is not allowed to recover his gift, even thought he is not knighted and is defrauded from the very first. Another notable example is the sales of commissions in the army. Within living memory such a transaction was perfectly lawful and a matter of common practice.

Winfield, *supra* note 2, at 94-95.

A good example of the current intolerable use of one's offices for pecuniary gain is in the case of Lemenda Trading Co. Ltd. v. African Middle East Petroleum Co. Ltd., [1988] 1 Q.B. 448, 2. W.L.R. 735, where it was held that it was undesirable to charge for using one's influence to obtain benefits from a person in a public position.

In the case of the United States, Stimson provides some interesting examples of older types of transactions that were considered contrary to public policy but are no longer considered to be offensive. E. STIMSON, CONFLICT OF LAWS 59-69 (1963) [hereinafter STIMSON]. *See, e.g.*, State v. Bell, 66 Tenn. 9 (1872) (miscegenation); State v. Ross, 76 N.C. 242 (1876) (polygamy, prohibition of marriage after divorce).

5. *See* Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26, 32 (1938) [hereinafter Goodrich]. The following passage is indicative of the problem:

> The initial difficulty is that public policy is such a general term that one can get from it almost anything he pleases. It is even broader than due process of law. In one sense it is, as courts have said, "The manifested will of the state." The sovereign

The elusiveness of public policy has been the subject of continuing controversy in the courts and among academicians.[6] Why is there disagreement among the courts and intellectuals over the use of public policy? Why might one of the parties resist its use? Generally, the forum will refuse to apply a governing substantive foreign law if it considers such law repugnant to its domestic public policy. Thus, public policy is used to defeat the application of substantive foreign rights or obligations in a particular dispute. When a transaction or activity takes place in a foreign jurisdiction and the parties are

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people of a state establish local public policy when they adopt a Constitution. *Id.* at 30-31.

Legislators make a state's policy in passing regulatory statutes. Judges manifest their views of public policy in the opinions they write. It is correct, in one sense of the term, to say that "when we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes, or judicial records." *Id.*

See also Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 747 (1924) [hereinafter Lorenzen] (public policy is "but a method whereby old rules are modified and new rules established").

6. Academic debate over public policy was pitched even in the days of the First Restatement. *See* BEALE, *supra* note 1; W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1947) [hereinafter COOK]; Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1 (1963) [hereinafter Currie]; Lorenzen, *supra* note 5, at 736; Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027 (1940). For judicial decisions and sometimes conflicting or contradictory views, *see* the discussion of English cases in Winfield, *supra* note 2, at 87-89. *See also* Fletcher v. Sondes, [1926] 130 Eng. Rep. 606; Richardson v. Mellish, [1824] 130 Eng. Rep. 294, 299-300; Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). *Kilberg* involved a wrongful death action in New York for a death caused by a plane crash in Massachussets. The question presented was whether limitations on damages imposed by Massachussets law, but prohibited by the New York Constitution, could nevertheless be enforced by New York courts. The plaintiff tried to characterize the dispute as one sounding in contract since decedents had purchased a plane ticket in New York and, arguably, New York law would govern. This would permit higher damages than would be available under Massachussets law. The court, contrary to its earlier opinion in Dyke v. Erie Ry. Co., 45 N.Y. 113 (1871), held that the contract characterization was not applicable. The court went further to explain that the limitations on damages for wrongful death would be contrary to New York public policy. According to the court, "New York's public policy prohibiting the imposition of limits on such damages is strong, clear and old. Since the Constitution of 1894, our basic law has been that 'The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitations.' " *Id.* at 528. However, in the case of Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918), the question was whether a New York plaintiff could be allowed to recover more under Massachussets exemplary damages law than the lower normal damages law of New York. Holding that the New York plaintiff could recover, the court relied again on New York public policy. This time, it concluded that New York had no public policy against the plaintiff recovering exemplary damages. *See also* cases cited *infra* notes 126-32 (dealing with gambling and public policy concerns); Intercontinental Hotel Corp. v. Golden, 15 N.Y.2d, 203 N.E.2d 210, 754 N.Y.S.2d (1964) (legalizing parimutuel betting). Florida refused to take such a tolerant view in Dorado Beach Hotel Corp. v. Jeruigan, 202 So. 2d 830 (Fla. Dist. Ct. App. 1987), holding a Puerto Rican gambling debt unenforceable in Florida against a Florida resident. Similarly, a Rhode Island agreement to share parimutuel winnings was held unenforceable in Ciampittiello v. Campitello, 134 Conn. 51, 54 A.2d 669 (1947).

subject to its laws, great injustice may be done to the parties and their expectations if the forum, without legitimate reasons, applies its public policy to defeat their legal rights and obligations.[7] Such an act on the part of the forum may even be unconstitutional as to the rights of parties and the law of the sister state in which the contract was entered into.[8] Some observers are also distressed by the notion that one of the parties in a legal dispute should be allowed to rely on public policy, as often happens, when the party cannot persuade the court on any cogent legal theory.[9] Under such circumstances, public policy may be an appeal to the subjective feelings of the court, thereby discouraging the development of concrete legal reasoning.[10] There is further concern that public policy may be a convenient instrument for courts to alter, rewrite, or even subvert, the terms of the contract for the parties by refusing to apply the governing foreign or proper law.[11] However, public policy may be hailed as necessary to ensure that basic and fundamental values of society are not subverted by sharp dealings, manipulative litigants, and by transactions contrary to the *esprit de corps* of the law.[12]

The controversy over the concept of public policy and the circumstances of its appropriate use seem magnified in interstate and international conflict of laws problems. In the case of interstate conflict of laws, when may a state legitimately reject an applicable sister state law as being repugnant to its local public policy? Should there be any restriction on the use of the concept by courts? There

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7. *See* STIMSON, *supra* note 4, at 56; Currie, *supra* note 6.

8. Constitutional questions that arise from this are significant. The United States Supreme Court addressed the public policy and constitutional implications of choice of law in Hughes v. Fetter, 341 U.S. 609 (1951). More recent cases dealing with the question in general include Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981); Phillips Petroleum Co. v. IRL Shutts, 472 U.S. 797 (1985); Sun Oil Co. v. Wortman, 486 U.S. 717 (1988). For academic writings, *see* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976) [hereinafter Kirgis]; Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976); Cavers, *Symposium: Conflict-of-Laws Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 1 (1981); Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982).

9. *See* Winfield, *supra* note 2, at 87.

10. *See* Paulsen & Sovern, *supra* note 2, at 970-80.

11. *See* sources cited *supra* notes 6-7.

12. The relationship between public policy and the spirit of the law was fully explored by the House of Lords in the famous case of Egerton v. Brownlow, [1853] 10 Eng. Rep. 359. In his opinion, Mr. Justice Creswell discussed the terms in a will which would be against public policy because they would be contrary to the spirit of the law, although not against the law itself. *Id.* at 393-94. According to Lorenzen, public policy "has been used in a comprehensive sense to include evasion of the law or fraud on the law." Lorenzen, *supra* note 5, at 747.

are important reasons why certain restraints on the use of public policy might be in order. According to Judge Beach:

> It would be an intolerable affectation of superior virtue for the courts of one state to pretend that the mere enforcement of a right validly created by the laws of a sister state would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or would be of such evil example as to corrupt the jury or the public.[13]

Thus, the concept may be narrowly defined and applied in interstate disputes. However, state courts may ignore this warning and define public policy so broadly as to apply it to a wide variety of cases.

In the case of disputes having international elements, there is also the question of how the concept may be used. What amount of respect should be given to foreign country laws in the face of conflicting laws or policies?[14] The increased level of contemporary interaction between people of different nations, cultural values, and legal systems will likely augment the number of disputes before United States courts that may be governed by foreign country laws.[15] If so, to what extent may the concept of public policy be used to defeat the application of governing foreign country laws? Is there a difference between the use of public policy in interstate and international conflict of laws problems?

The purpose of this article is to develop some answers to these questions as they apply to California. The choice of California for this study is based on several considerations. California has a well-established liberal tradition in legislation and judicial decisions. It is seen as supportive of progressive views both socially and legally, with a tolerance for novel legal concepts.[16] California is also a significant

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13. *See* Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656, 662 (1918) [hereinafter Beach].

14. The decision of how much respect to give to foreign country laws is not as simple as that of interstate cases. Professor Ehrenzweig discusses more directly in enforcement of judgment cases where the original cause of action is contrary to the public policy of a foreign nation. *See* EHRENZWEIG, *supra* note 1, at 199. *See also* an extensive discussion of the topic in CHESCHIRE & NORTH, *supra* note 1, at 130-40.

15. Yelpaala, *Choice of Law and Foreign Clauses in International Transactions in Common Law Jurisdictions*, in DRAFTING AND ENFORCING CONTRACTS IN CIVIL AND COMMON LAW JURISDICTIONS 212 (1986) [hereinafter Yelpaala].

16. California's liberal tradition is said to have started in the early days of the State. For instance, the comparative impairment approach in choice of law calls for the application of the law of the state whose interest would be most impaired in the case of a true conflict of laws. Professor Horowitz has argued that the comparative impairment approach has its origins in the 1858 California Supreme Court opinion in *Ex Parte* Archy, 9 Cal. 147 (1858). In this case, the question was whether a runaway slave who had been hired out for labor in California

economic unit in international trade and investment.[17] Assuming that

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by his Mississippi owner should be returned to the latter. Slavery was declared illegal by the California Constitution, but was legal in Mississippi. In trying to resolve this issue, the Court balanced the interests of the respective states and that of the federal system. It refused, but only prospectively, the return of the slave to his Mississippi owner. For an extensive discussion of this case, *see* Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. REV. 719, 720-23, 748-49 (1974). Another example of California's lead in the development and application of legal concepts can be found in the family law area. It is claimed that California was the first state to adopt a liberal no-fault divorce law. *See* Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1269 (1974). One of the most celebrated California Supreme Court decisions in the family law area was the case of Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). The issue in this case was whether cohabitation could create rights in the property of a man for his cohabiting female partner. Reversing the trial court ruling, the California Supreme Court held that whether or not the plaintiff was entitled to a trial on the merits of her case was a matter of contract. According to the Court:

> The Courts should enforce express contracts between non-marital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnerships or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.

Id. at 665. The court explained its conclusion by saying that adults who voluntarily cohabit as sexual partners are nonetheless as competent as any other persons to enter into a contract with respect to their earnings. *Id.* at 674.

The philosophy of the Court is best captured by the following statement:

> In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. . . . We conclude that the judicial barriers that may stand in the way of policy based upon the fulfillment of the reasonable expectations of the parties to a non-marital relationship should be removed.

Id. at 683-84.

The *Marvin* case has been the subject of much intellectual commentary. According to such commentary, the *Marvin* opinion was not the first of its type in California, but simply the one in which the Supreme Court of California resolved the conflict between the lower courts on the issue. *See, e.g., In re* Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), where the Court boldly expanded the quasi-marital property doctrine to cohabiting couples. *See also* Estate of Atherley, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1957), applying the same doctrine. *But see* Beckman v. Mayhew, 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1974) (rejecting the doctrine). For a thoughtful analysis of *Marvin* and its impact, *see* Kay & Amyx, Marvin v. Marvin-*Preserving the Options*, 65 CALIF. L. REV. 937, 956-62 (1977). A student comment has described the opinion in *Marvin* as very liberal and calling for the setting aside of moral considerations in dealing with cohabitors and their legal problems. *See* Comment, Marvin v. Marvin: *Five Years Later*, 65 MARQ. L. REV. 389, 390 (1982). It is reported that some states have followed *Marvin*. *See* Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 59 (1985). One thoughtful comment notes that *Marvin* was not a major departure from existing practice, but that it nevertheless limited the discretionary power of courts to reject enforcement of non-meretricious contractual relationships between cohabitors. *See* Comment, *Property Rights Upon Termination of Unmarried Cohabitation*: Marvin v. Marvin, 90 HARV. L. REV. 1708, 1713-14 (1977). In the area of commercial arbitration, the U.S. Supreme Court recently commented that California had taken the lead in providing a procedure which

these perceptions are accurate, how do California courts use public policy in resolving disputes? Would the fluidity in the concept of public policy be further disturbed by the state's progressive views, thereby making its use even more unpredictable? Furthermore, the use of public policy in the choice of law area is generally associated with the traditional or First Restatement approach to choice of law.[18] In 1967, the California Supreme Court decision in *Reich v. Purcell*,[19] abandoned the traditional approach to choice of law for governmental interest analysis, and subsequently adopted the comparative impairment approach.[20] However, the recent California Supreme Court decision in *Wong v. Tenneco*[21] may well be signaling a return to the traditional approach to choice of law analysis. This trend does not appear to be peculiar to California.[22] If, indeed, there is a return to the traditional approach or some version of it, then more questions must be answered as to the role of public policy in California conflict of laws. If *Wong* was an aberration and California courts continue to use the comparative impairment approach, it might be instructive to determine whether public policy considerations ever influence the use and results of comparative impairment analysis.

This article will, therefore, address the following topics and questions: (1) What is the general concept of public policy? (2) Assuming

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the Federal Arbitration Act did not. *See* Volt Information Sciences Inc. v. Board of Trustees of the Leland Stanford Junior Univ., 109 S. Ct. 1248, 1259 (1989).

17. *See* J. TURNER, FOREIGN DIRECT INVESTMENT IN CALIFORNIA (California Department of Commerce, Office of Economic Research 1987). This was a report to Governor George Deukmejian which described California's position regarding inward foreign direct investment in the United States. According to the report, California is one of the leading states in attracting foreign direct investment across the board. *See id.* at 15-23 and accompanying statistics.

18. Section 612 of the First Restatement of Conflict of Laws recognizes the public policy exception in the following terms: "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum. . . ." THE RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 612 (1934).

19. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

20. Comparative impairment or the "California approach" was the brain child of Baxter who tried to improve on interest analysis. *See* Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963) [hereinafter Baxter]. Another valuable contribution to the concept was made Professor Horowitz. *See* Horowitz, *The Law of Choice of Law in California - A Restatement*, 21 UCLA L. REV. 719 (1974) [hereinafter Horowitz]. For cases in which comparative impairment was used, *see* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976); Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

21. 39 Cal. 3d 126, 702 P.2d 570, 216 Cal. Rptr. 412 (1985).

22. A few state courts seem to be reviving the public policy exception even under modern choice of law methods. *See* Boardman v. United Services Auto. Ass'n, 470 So. 2d 1024 (Miss. 1985), *cert. denied*, 474 U.S. 980 (1985); Schultz v. Boy Scouts of America Inc., 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

some definition of public policy, is there a distinction between *policy* and *public policy*? In other words, does every statute announce a particular public policy? (3) What is the meaning of public policy in California? Is there any distinction between policy and public policy as used by California courts? Does public policy change depending on whether it is used to resolve a purely local intrastate, inter-state, or international conflict of laws disputes? (4) How is public policy used by the courts of California in the following conflict of laws settings: choice of law, choice of forum, and arbitration agreements? (5) To what extent does public policy affect the enforcement of sister state judgments, foreign country judgments, and arbitral awards in general? These questions will be addressed sequentially in the following sections.

II. Public Policy: A Legal Analysis

A. *What is Public Policy?*

The meaning of public policy has always eluded even the most astute judicial minds in various common law systems. Judges, jurists, and academics continue to struggle with defining the contours of the concept and its application in specific situations.[23] One theme that seems to underscore the struggle with the concept of public policy is the view that public policy shares the distinction of vagueness and intractability with fraud and other legal concepts notorious for their elusiveness. The way public policy is viewed by the courts is best exemplified by the following statement by Justice Shenk of the California Supreme Court:

> The term 'public policy' is inherently not subject to precise definition. . . The question, what is public policy in a given case, is as broad as the question of what is fraud. . . . Public policy is a vague expression, and few cases can arise in which its application may not be disputed.[24]

Notwithstanding the vagueness in the concept, Justice Shenk adopted the definition of public policy as provided by Justice Story, one of the most outstanding conflict of laws scholars in the United States. According to Story:

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23. *See supra* notes 1-6 and accompanying text.
24. Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953).

> public policy means anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel is against public policy.[25]

It is obvious that this definition does not tell us much since Story seems to rely on public policy to define it. What is apparent in this definition is that public policy is not linked to some entrenched global community value system, but rather to individualism and individual rights. Less apparent, however, is the fact that public policy is a negative concept operating as a check on that which is offensive to the public sense of good morals, equity, and justice.[26] It operates, or should operate, as a comprehensive phenomenon that fills in the gaps in the law,[27] and ensures that the legal principles applied by the courts reflect the basic moral values of society.

Notwithstanding these definition problems, several other attempts have been made to define public policy. There are at least eight ways in which public policy may be used by the courts. First, it may be used in the ordinary sense.[28] One of the earliest cases in which the ordinary meaning of public policy was addressed was the celebrated English case of *Egerton v. Brownlow*.[29] In that case, the House of Lords had to determine whether it was against public policy for a

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25. *Id.* (citing and adopting the definition from Story's work).

26. *See* Lorenzen, *supra* note 5, at 747.

27. Winfield, *supra* note 2, at 77-79. However, Winfield argued that public policy was routinely being checked by decided cases, thus reducing the need for its use. The following passage is quite instructive on that point:

> Instead of sprawling in vaporous fashion across the legal atmosphere like a genie of the Arabian Nights, it is shrinking to certain departments of the law; but no one had yet thought of imprisoning it in a jar, and indeed no one has ever been able to do that. There were several agents at work in this shrinking process. Case law and statutes between them were rapidly reducing to certainty what had been under the vague control of reason, convenience, and policy. Every new decision that was printed had a twofold effect. It covered some ground which had been unfenced till then, and it formed an outpost for further exploration. The fuller the reports became, the less need was there for appeal to the law of nature, the law of reason, or the law of God.

Id. at 84.

28. The various meanings of public policy and the different circumstances under which the concept might be used are so many that it will not be useful to catalogue all of them here. According to Chitty, the scope of public policy falls into five groups: (1) objects illegal at common law or by legislation; (2) objects injurious to good government, including domestic and international affairs; (3) objects designed to interfere with the justice system; (4) those that are injurious to marriage and morality; and (5) those against the economic interest of the public. CHITTY ON CONTRACTS, *supra* note 1, at 548. Farnsworth divides public policy into two broad categories, each with several subcategories: (1) policies developed by the courts; and (2) policies developed from legislation. FARNSWORTH, *supra* note 1, at 325-57.

29. [1853] 10 Eng. Rep. 359, 4. H.L. Cas. 1.

nobleman, one of their own, to make a testamentary grant of his vast wealth to a branch of his family contingent upon the acquisition of a peerage. There was neither statutory nor judicial opinion prohibiting this conditional grant. To answer the question whether or not the testamentary disposition was against public policy, the court had to define public policy. After a thorough examination of the concept, in which their Lordships sought wide counsel on the matter from several judges,[30] Justice Baron Parke concluded that public policy had an ordinary meaning.[31] In the ordinary sense, public policy meant political expediency or that which is good for the common good of the community.[32]

However, not even the ordinary meaning of public policy was free from vagueness. According to Baron Parke, the ordinary meaning of public policy would vary with the level of education, station in life, or other sociological factors.[33] If public policy takes its meaning and shape from the type of person using it, it is not entirely clear how the courts may use it. Must judges employ their own meaning or discover the ordinary meaning by reference to some community or reasonable person standard? If the courts decide to employ such a standard, must it be teated as a jury question? From the discussion of Baron Parke, one gets the impression that the issue of public policy should not be a jury question. Judges must be presumed to better understand the fundamental values enshrined in the legal system. They must be viewed as knowing what is good for the community. While it may be argued that a jury is better placed to echo and decide on what is good for the community, the question of public policy is invariably left to the court as a question of law.

In *Egerton*, the House of Lords was faced with a case of first impression in which the role of public policy in the outcome was significant. Their Lordships, therefore, took the opportunity to investigate and express different views on the meaning and scope of public policy at common law. To some, there was a link between illegality and public policy. Not only would illegal transactions be void, but they would also be contrary to public policy. Justice

30. The case attracted a lot of judicial attention. According to Winfield, 16 judges fought a pitched battle over the questions raised in *Egerton*. The reports of the case took 256 pages of the law reports. The House of Lords summoned the judges to attend to give their views on the question. Eleven judges attended. *See* Winfield, *supra* note 2, at 88.

31. *Egerton*, 10 Eng. Rep. at 409.

32. *Id.*

33. *Id.*

Crompton developed a test for such transactions which may be characterized as the object and means test.[34] That is, one must examine the object of the transaction and the means by which it is to be obtained. The object itself may be illegal, or, being legal, its attainment may require some wicked or illegal means. If the object is illegal, such as murder, theft, or some other crime, the transaction is illegal. Even if the object of the transaction is legal, laudable, and attainable by legal means, if a condition requires illegal means, it would be illegal and void.[35] Thus, it would undermine the foundations of the legal system and the public good if such transactions were enforced. As will be discussed later, Justice Crompton's object and means test seems to have been applied by California courts in their decisions dealing with public policy.

Another important contribution to the meaning of public in the *Egerton* case was offered by the Lord Chief Baron. To him, public policy is a protective concept designed to insulate society from the negative impact of individual transactions or activities.[36] Baron Parke used the concept synonymously with public safety. According to him, there is more than ample judicial and intellectual authority against enforcing contracts or covenants solely on the broad ground of public good. Where in a transaction one cannot find *dolus malus*, or in Justice Crompton's terms some wicked or illegal motive as to other persons, but the rest of mankind may nevertheless be concerned about its negative impact, such a transaction would be caught by the public policy exception.[37] A review of the numerous cases in which the concept is used leaves one with the distinct impression that several courts follow the Lord Chief Baron's formulation. But as a protective device, public policy again becomes an open-ended concept unless confined by certain factors. For example, how would judges determine what is good for society? Is the protective policy invoked every time judges disapprove of particular transactions or favor certain social phenomena? These are relevant and important questions raised by Justice Baron Parke. In response to these concerns, he argued that reliance on public policy as a protective device might be controlled if courts relied on the policy of the law.[38]

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34. *Id* at 389. In addition to the object and means test, Justice Crompton also argued that the use of public policy must show some definite mischief to the public. *Id.*
35. *Id.*
36. *Egerton*, 10 Eng. Rep. at 417.
37. *Id.*
38. *Id.* at 420. The application of the policy of the law seems to have been one of the

Public policy may be used in a comprehensive sense to mean *jus cogens* or that body of compulsory and higher order of norms to which every human behavior, transaction or activity must conform.[39] In this sense, public policy constitutes a set of peremptory norms severely limiting party autonomy and the legal consequences of individual conduct. It is, however, not entirely clear whether there actually exists such norms and how they may be discovered by the courts. Neither the courts nor academic writers give us much guidance on this subject.[40] If public policy can be used as a body of compulsory norms, however, mandating or conditioning the legal consequences of individual conduct, the term is very similar in meaning to the use of public policy as natural law.[41] Its meaning could then be influenced by theological considerations and the concept of a higher divine law to which all law and conduct must conform.[42] All non-conforming

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goals of modern choice of law theories in the United States. For instance, interest analysis theory explicitly calls for taking into account the policy of the law. For a detailed analysis of this approach, *see* the writings of Currie and the discussion in notes 133 and 145, *infra*. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). Section 6 deals with choice of law principles. It requires the forum, in the appropriate case, to take into account the basic policies underlying the particular field of law and the particular policies of the forum. *Id.*

39. *Jus cogens* is a concept often used in international law which may at times have municipal use and implications. For its use in the international context, *see* J. SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL (1974). In particular, *see id.* at 8-10 for a discussion of the relationship of *jus cogens* to public policy. *See also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (3d ed. 1979) [hereinafter BROWNLIE]; Husserl, *supra* note 1, at 38.

40. BROWNLIE, *supra* note 39, at 512 discusses the concept and its lack of success.

41. Natural law itself is another concept that means different things to different people. *See, e.g.*, Walkin, *Cicero and the Law of Nature*, in ORIGINS OF THE NATURAL LAW TRADITION 23 (A. Harding ed. 1954). Walkin quotes an often cited definition of natural law by Cicero:

> There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law, and it requires no Sextus Aelius to expound and interpret it. It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of a man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment.

Id. at 23-24. *See also* City of London v. Wood, [1708] 188 Eng. Rep. 1592, 1592-1603, 12 Mod. 669, 670-88.

42. For a discussion of this aspect of natural law, *see* Davitt, *St. Thomas Aquinas and the Natural Law*, in ORIGINS OF THE NATURAL LAW TRADITION 30 (A. Harding ed. 1954). The author postulates that the concept is associated with some ordering by one in authority.

laws must then be struck as contrary to public policy. On the other hand, public policy could mean natural law in the more positivistic, Aristotelian or Thomist sense.[43] In that sense, it could mean the rule of reason against which no law, custom, or statute could prevail. Whether used in the theological or more positivistic Aristotlean sense, public policy as natural law constitutes a higher order of norms, inalienable or indelible in character, and from which there can be no derogation.[44] To that extent, public policy as natural law is similar to its use as *jus cogens*. In either sense, public policy would be a broad concept that could be used to affect the legal consequences of virtually any transaction.

Public policy could, however, be used in a less all-embracing or compelling sense. Indeed, it has often been used by some courts and academicians to mean good morals, fundamental values of society, or deeply-rooted values accepted as the basis of social ordering. This meaning of public policy is perhaps best captured by the often-quoted statement of Judge Cardozo in *Loucks v. Standard Oil*.[45] According to Judge Cardozo,

> courts are not free to refuse the enforcement of foreign rights at the pleasure of the judges unless doing so would violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal.[46]

Public policy, according to this passage, cannot be invoked in trivial matters or where the fundamental value system of society is neither threatened nor violated. Thus, the use of public policy has been limited to cases where foreign law is considered barbarous or monstrous. It has also been applied to transactions considered manifestly unjust, outrageous to the forum's sense of justice, or offensive to some moral, social, or economic principles considered by the forum as sacrosanct.[47]

Compared with the other uses, defining public policy as "good morals" could severely restrict the circumstances under which it might

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43. *See* B. BROWN, THE NATURAL LAW READER 47 (1960), for a discussion of scholastic natural law jurisprudence.

44. *See supra* notes 39-41.

45. 224 N.Y. 99, 120 N.E. 198 (1918).

46. *Id* at 111.

47. CHESCHIRE & NORTH, *supra* note 1, at 131. On the issue of barbarous laws, *see* Cammell v. Sewell, [1860] 157 Eng. Rep. 1371. The question in *Cammell* was whether English or Norwegian law should govern the sale of lumber in Norway after a shipwreck. Justice Cromptom argued that applying Norwegian law would not be offensive to the United Kingdom. He said, "It does not appear to us that there is anything so barbarous or monstrous in this state of the law as that we can say that it should not be reorganized by us." *Id.* at 1377.

be used. This is particularly true in interstate or international conflict of laws problems. A court that is called upon to reject an otherwise governing law on public policy grounds must find that applying that law would be outrageous or revolting to deeply rooted values and fundamental notions of justice. In a federal system, such as the United States, where the states have similar cultural and historical origins, few situations *should* arise where the laws of one state could be offensive or intolerable to the good morals of another state.[48] Any "complacent attribution of moral superiority" by the courts of any state could undermine the broader social goals of the federal union.[49] Even though terms such as "good morals," "fundamental values," and "deeply rooted conceptions of justice" suggest limitations on courts, they are also inherently open-ended, requiring further definition. Public policy, therefore, stands to be exploited or abused even when used in this restricted sense.

There is yet another sense in which public policy may be used. It has sometimes been used when referring to "natural justice, equity, and good conscience."[50] This use of public policy is similar to some aspects of its use as natural law and good morals. The expression "natural justice, equity, and good conscience" refers to certain procedural, substantive, and customarily accepted notions of justice in society.[51] It is often used in a concrete rather than an abstract sense. Like obscenity, you know it when you see or hear it.[52] It is better felt than described. Taken as a whole, the term "natural justice, equity, and good conscience" also works in the negative. When foreign procedural or substantive law is considered repugnant to "natural justice, equity, and good conscience," the forum will reject the application of such law or any legal rights created thereunder.

The preceding use of public policy was most prevalent in the colonial process in Africa for pruning customary law considered

48. This was the concern and desired outcome suggested by, *inter alia*, Beach, *supra* note 13, and Paulsen & Sovern, *supra* note 2.

49. Justice Traynor adopted his own version of the often quoted language of Judge Beach in Biewend v. Biewend, 17 Cal. 2d 108, 114, 109 P.2d 701 (1941).

50. *See* A. ALLOTT, ESSAYS IN AFRICAN LAW 197 (1960) [hereinafter ALLOTT]; E. DANIELS, THE COMMON LAW IN WEST AFRICA (1964) [hereinafter DANIELS]; Seidman, *The Reception of English Law in Colonial Africa Revisited*, 2 E. AFRICA L. REV. 47 (1969) [hereinafter Seidman].

51. ALLOTT, *supra* note 50, at 198. Allott identifies at least five procedural matters generally caught within the concept of natural justice: (1) No man can be a judge in his own case; (2) no man is to be condemned unheard; (3) a man is entitled to know the particulars of the charges against him; (4) decisions should be supported by reasons; and (5) punishment and awards should not be excessive. *Id.*

52. *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

repugnant to "natural justice, equity, and good conscience."[53] As equity, public policy could be used as a waiver of technical rules which would produce manifest and substantially unfair results.[54] In this context, public policy may be used to appeal to the community sense of fairness and justice in the particular circumstance.[55] Thus, when the repugnancy concept is used to reject an otherwise applicable foreign law, it is because such law would offend the forum's sense of justice and fairness. Furthermore, public policy may also be used as good conscience to prohibit the application of foreign law when it is contrary to the forum's sense of what is right or wrong. In this context, public policy includes morality.

B. *Problems with Public Policy*

It is apparent from the foregoing analysis that no matter how public policy is defined, it remains elusive, open ended, and therefore, subject to varying degrees of definition and application. To some, public policy is the *bête noire* of judicial decision making.[56] It constitutes a potentially treacherous tool for judges at times too eager to reach subjective rather than legal conclusions. Thus, it is difficult to predict when it may be used. The facts of a particular dispute may not implicate a single policy of the forum; they may affect two or more contradictory policies. Choosing the appropriate public

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53. *See* DANIELS, *supra* note 50; Seidman, *supra* note 50. The concept of "good conscience" is similar to "conscionability" in contract law. A contract may be said to be unconscionable and unenforceable or void because the terms are so grossly inadequate as "to shock the conscience and common sense of all men. It may amount both at law and in equity to proof of fraud, oppression and undue influence." State Fin. Co. v. Smith, 44 Cal. App. 2d 688, 691-92, 112 P.2d 901 (1941); *see also* Jacklich v. Baer, 37 Cal. App. 2d 684, 135 P.2d 179 (1943) (creditor provided in loan agreement that payment of five dollars would entitle him to collect 10% of debtors income). The court in *Jacklich* refused to enforce the contract as being unreasonable and unconscionable. *Id.* Unconscionability is also used in contracts where the parties are generally of unequal bargaining power. For intellectual commentary, *see generally* Hurd & Bush, *Unconscionability: A Matter of Conscience for California Consumers*, 25 HASTINGS L.J. 1, 15 (1973); Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1152-60 (1976); Sybert, *Adhesion Theory in California: A Suggested Redefinition and its Application to Banking*, 11 LOY. L. REV. 301, 301-05 (1978); Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). For the most recent California Supreme Court decision on unconscionability, *see* Graham v. Scissor-Tail Inc., 28 Cal. 3d 80, 623 P.2d 165, 171 Cal. Rptr. 604 (1981), where the court held an arbitration agreement unenforceable because it was unreasonable. *See also* discussion of arbitration cases *infra* notes 377-81.

54. ALLOTT, *supra* note 50, at 198.

55. *See* Knodel v. Knodel, 14 Cal. 3d 752, 537 P.2d 353, 122 Cal. Rptr. 521 (1975), where it was held that comity principles would not be applied to modify foreign support obligations if it would contravene California public policy because it was inequitable.

56. *See* Paulsen & Sovern, *supra* note 2, at 980-81.

policy to be advanced, therefore, becomes the task of the forum. It is not unusual for the forum to make a choice that most people would consider unacceptable.[57]

One concern with public policy is that a subjective tolerance or intolerance for foreign repugnant laws based on public policy may result in judicial inertia, thereby preventing concrete legal analysis and conclusions. Public policy then becomes an inadequate substitute for legal reasoning, offering little guidance to litigants and courts in future disputes. Public policy may even become a disguise for the advancement of ulterior motives or undeclared judicial agendae.[58] Little wonder then that some judges have expressed serious concern over the use of public policy except in limited and well-defined situations. This view was most clearly articulated by Chief Justice Best of the United Kingdom.[59] According to him, the use of public policy is only appropriate when the applicable policy is not in doubt. The legislature is better equipped to settle doubtful questions of policy.[60] In support of the position taken by Chief Justice Best,

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57. For instance, the evils of slavery have been condemned by most societies in modern times. Transactions involving slavery or slave trade were considered repugnant to the fundamental morals of most western societies. Yet, a Massachusetts court, in the case of Greenwood v. Curtis, 6 Mass. 358 (1810), was willing to enforce a note for the sale and delivery of slaves in Africa and South Carolina. Notwithstanding the fact that the state of Massachusetts had outlawed slavery and slave trade, and in spite of the defendant's contention that slavery was contrary to Massachusetts public policy as immoral and vicious, the court re-characterized the claim as one for the recovery of a cash amount in the defendant's account. Similarly, a New York court found that it was not against its public policy to allow a German anti-semitic and racist statute to defeat a claim by a Jewish plaintiff for wrongful termination of an employment contract in Germany. *See* Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474, 14 N.E.2d 798 (1938). However, the California Supreme Court, in the case of *Ex Parte* Archy, 9 Cal. 147 (1858), relied on the public policy against slavery in the California Constitution to refuse the prospective return of a slave to his Mississippi owner. *See also* Horowitz, *supra* note 20, at 720 (extensive discussion of *Archy*).

58. *See* Paulsen & Sovern, *supra* note 2, at 988-89.

59. Richardson v. Mellish, [1824] 130 Eng. Rep. 294.

60. *Id.* Chief Justice Best protested against frequent judicial resort to public policy in the following terms:

> We have heard much of this being a contravention of public policy, and that, on that ground, it cannot be supported. I am not much disposed to yield to arguments of public policy: I think the courts of Westminster-hall (speaking with deference as an humble individual like myself ought to speak of the judgments of those who have gone before me) have gone much further than they were warranted in going in questions of policy: they have taken on themselves, sometimes, to decide doubtful questions of policy; and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say, it is not a doubtful matter of policy that will decide this, or that will prevent the party from recovering:—if once you bring it to that, the plaintiff is entitled to recover; and let that doubtful question of policy be settled by that high tribunal, namely, the legislature, which has the

Justice Burrough expressed his concerns in the same case in the following terms:

> I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.[61]

If public policy is used to defeat sound law, it may reflect the forum's own inability to obtain desirable results within the context of its existing choice of law rules. According to Lorenzen, as a choice of law device, public policy is the outgrowth of a system of *a priori* theories built on logical deductions not always supported by reality.[62] The existence and frequent use of public policy in conflict of laws settings is accordingly viewed as an indictment of the rigidity of the traditional approach to the choice of law process.[63]

Finally, one of the problems facing the doctrine of public policy is the sources of policy. That is, does every statute or legislative act announce a public policy? Where can one find the public policy of a state or a foreign country? According to the United States Supreme Court, "the public policy of any state is to be found in its constitution, acts of the legislature and decisions of its courts. Primarily, it is for the lawmakers to determine the public policy of the state."[64] Interpreting this language, some courts have found a public policy announcement in virtually every legislative act or judicial decision. Differences in law may then signify conflicting public policies resulting in the use of the repugnancy doctrine. An example of this problem is the decision of a New York court dealing with interspousal

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> means of bringing before it all the considerations that bear on the question, and can settle it on its true and broad principles. I admit, that if it be clearly put upon the contravention of public policy, the Plaintiff cannot succeed: but it must be unquestionable,—there must be no doubt;—looking at all the facts of this case, I can see no unquestioned principle of policy that stands in the way of the Plaintiff to hinder him recovering in this action.

Id. at 242-43.

61. *Id.* at 252.

62. Lorenzen, *supra* note 5, at 746.

63. The use of escape devices including public policy has been explained as necessitated by rigid rules which had become fossils or wooden outposts directing the law into dark alleys. That attack on escape devices came to a head after the decision in Levy v. Daniels' U-Drive Auto Renting Co., 18 Conn. 333, 143 A. 163, 164 (1928), where the court recharacterized a tort claim as a contract claim in order to avoid the negative consequences of the *lex loci dilecti* principle. *See* H. GOODRICH, CONFLICT OF LAWS 280 (3d ed. 1949); *see also* Currie, *supra* note 6, at 10-12; Lorenzen, *supra* note 5, at 746.

64. Building Serv. Employees Int'l Union Local 262 v. Gazzam, 339 U.S. 532, 537-38 (1950).

immunity. In *Mertz v. Mertz*,[65] a wife sued her husband in New York for injuries sustained in Connecticut through the negligent driving of the husband. While Connecticut would allow the suit, New York's interspousal immunity doctrine at that time would not permit the suit. Shutting the doors of the New York courts to the wife, the court ruled that allowing Connecticut law to govern would offend New York public policy as expressed in its common law rule of interspousal immunity. The courts in California, however, have held that a mere difference in laws does not justify the application of the repugnancy doctrine.[66]

It is unclear whether these decisions could be properly interpreted to mean that not every law is an announcement of public policy. The courts have not focused attention on the distinction between the specific policy behind a particular statute or court decision, and the public policy underlying a statute or a decision. If we rely on the often-cited formulation of public policy by Judge Cardozo in *Loucks v. Standard Oil*,[67] a statute or a decision would announce a state public policy only if it addresses some fundamental principle of justice, deeply rooted traditions, or good morals. A statute or common law rule against enforcing contracts for prostitution or the sale of public offices may well fall under Cardozo's classical formulation. In an age of excessive legislation, a sound argument can be made that not all statutes announce public policy, however defined, though they may address some specific policies.

The California Supreme Court, in its employment-at-will cases, has suggested a standard by which to judge the pronouncement of public policy in a statute.[68] According to the court, where a particular

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65. 271 N.Y. 466, 3 N.E.2d 597 (1936).

66. *See, e.g.*, Loranger v. Nadeau, 215 Cal. 362, 367, 10 P.2d 63 (1932) (mere difference in guest statutes did not constitute a violation of California public policy); Whitney v. Dodge, 105 Cal. 192, 200, 38 P. 636 (1894) (difference in law not sufficient to negate application of foreign law on public policy grounds).

67. 224 N.Y. 99, 111, 120 N.E. 198 (1918).

68. *See* Dabbs v. Cardiopulmonary Management, 188 Cal. App. 3d 1437, 234 Cal. Rptr. 129 (1987), where it was held that an employee who was terminated for protesting against working conditions could sue the employer on the grounds that the California labor code expressed that state's public policy of protecting employees. In Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), it was held that an employer's right to discharge an at-will employee was subject to the public policy of the state. This was followed by Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 330, 164 Cal. Rptr. 839 (1980), and Hentzel v. Singer Co., 138 Cal. App. 3d 290, 295-96, 188 Cal. Rptr. 159 (1982), holding that the public policy of California protects an employee from termination on the job for complaining about work conditions. The recent California Supreme Court decision in Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), seems to have halted this trend in California. For an extensive discussion of *Foley, see* Levine, *Judicial Backpedaling: Putting the Brakes on California's Law of Wrongful Termination*, 20 PAC. L.J. 993, 1012-14 (1989).

conduct is said to be violative of public policy, we must inquire whether the prohibition of the conduct inures to the benefit of the public at large rather than to a particular person. The court explained this standard in the following terms:

> many statutes simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental policy concerns.[69]

Thus, statutes or regulations that affect the rights and liabilities of individuals *inter se* may, indeed, not announce any public policy. Whether any statute was intended to benefit individuals and not society at large remains an actually debatable issue. In *Foley v. Interactive Data Corp.*, the California Supreme Court held that where an employee reports to the employer about investigations of his supervisor for embezzlement by the Federal Bureau of Investigation, it was only the employer and not the public at large who benefitted.[70] This interpretation of benefit, as pointed out by one of the dissenting voices, may be too narrow since the punishment of a criminal employee may advance the interest of both the public and the employer.[71]

The *Foley* case may be criticized for adopting a narrow interpretation of public interest and, hence, public policy. It nevertheless lends judicial support to the argument that there is a distinction between specific policy and public policy. Whereas every statute may announce some specific state policy on a particular subject, all statutes do not announce a public policy. If the statute is to protect some public interest at large, then it may be announcing a public policy. The distinction between public policy and specific policy is

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69. *Foley*, 47 Cal. 3d at 699.

70. *Id.* at 670-71.

71. The following passage is what dissenting Justice Mosk had to say about benefit and public policy:

> My colleagues insist that reporting the presence of an embezzler to an employer is solely to the benefit of the employer. While undoubtedly it is to the employer's benefit, it is not exclusively so. It is my opinion that such action—i.e., advising a state-created corporation of the employ in a supervisorial position of a person chargeable with a potential felony—is in the best interests of society as a whole, and therefore covered by the public policy rule.
>
> Under Labor Code section 1102.5, subdivision (b), an employer is prohibited from retaliating against an employee for disclosing information to a law enforcement agency when there is reasonable cause to believe a violation of state or federal laws has been committed. It seems incongruous to permit retaliation and discharge when the employee chooses to go directly to his employer with the information, rather than to circumvent the employer, go behind his back and directly to a public agency. In either event, it seems clear to me that the law and public policy are implicated.

Id. at 724 (Mosk, J., dissenting).

similar to the one drawn between penal and non-penal statutes. According to decided cases in California and other states, a statute is penal if it awards a penalty to the state or to a member of the public who sues in the interest of the community to remedy a public wrong.[72] The purpose of such a statute must be the vindication of some public justice. This distinction could be particularly helpful in determining public policy in interstate and international conflict of laws problems. It would impose limitations on the use of public policy as a repugnancy instrument to strike down otherwise applicable law.

C. *Public Policy in California*

There are at least two ways in which one can discuss the use of public policy in California: (1) its use in purely domestic California disputes, and (2) its use in interstate or international conflict of laws problems. Though the use of public policy in purely California disputes is not the focus of this article, it is nevertheless relevant to a complete understanding of the general topic. A few brief comments will be made here about the use of public policy in domestic cases.

California courts have struggled with the elusiveness of the public policy concept for decades.[73] In search of concrete definitions, courts have likened it to fraud,[74] and one academic has argued that it is broader than due process considerations under the United States Constitution.[75] The result of this accepted elusiveness of public policy

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72. *See* Chavarria v. Superior Court, 40 Cal. App. 3d 1073, 115 Cal. Rptr. 549 (1974). Most states rely on the United States Supreme Court definition of penal and non-penal in Huntington v. Attrill, 146 U.S. 657 (1892). *See also* Loucks v. Standard Oil, 224 N.Y. 99, 120 N.E. 198 (1918) (Cardozo's formulation); RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 611 comment a (1934) ("A penalty . . . is a sum of money exacted as punishment for a civil wrong as distinguished from compensation for the loss suffered by the injured party. Where the wrong makes the wrongdoer a statutory party to an already existing duty, the duty is not a penalty, since the injured person obtains only payment of his claim"); Leflar, *Extra-state Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 225 (1932).

73. The intractability of public policy has been commented on in several cases in California. The following are only a few examples of judicial views on the subject. In Spence v. Harvey, 22 Cal. 336, 340 (1863), it was described as such a vague expression that few cases would arise where its application would be disputed. In Smith v. San Francisco & N.P.R. Co., 115 Cal. 584, 600, 47 P. 582 (1897), it was described as vague and uncertain in meaning pertaining to the law-making power. A sample of judicial expressions fall within the characterization of public policy as vague, variable, uncertain, etc. *See also* Spangenberg v. Spangenberg, 19 Cal. App. 439, 126 P. 379 (1912); Noble v. Palo Alto, 89 Cal. App. 47, 264 P. 529 (1928); County of San Bernadino v. Gate City Creamery Co., 103 Cal. App. 367, 284 P. 457 (1930).

74. *See* Safeway Stores v. Retail Clerks Int'l Assn., 41 Cal. 2d 567, 575, 261 P.2d 721 (1953).

75. Goodrich, *supra* note 5, at 31.

has been its application to a multitude of sins in domestic California disputes. Operating essentially as a negative edit, it has been used to strike down otherwise enforceable rights in labor disputes,[76] contracts involving public officers,[77] employment relations,[78] the duties of public officials,[79] the exercise of voting power by stockholders,[80] and the traditional vitiating elements in contract. Until the *Foley* case, there was a growing tendency in California for the courts to use public policy to impose an affirmative duty or create a legal right that could form the basis of a claim. In other words, the courts had taken the position in certain employment-at-will cases that the termination of an employee may be a violation of an express California public policy for which the employer may be held liable.[81] Public policy is not used here as a negative edit, but in a positive and affirmative sense. The notion that public policy can be used not just in its negative sense, but also as a positive instrument for the creation of legal rights and affirmative duties, exposes foreign defendants to yet another facet of this elusive concept. Indeed, it may confirm the notion that public policy is an unruly horse, or, like Banquo's ghost, that it appears when least expected. It is therefore a trap for the unwary.

III. Public Policy in Interstate and International Conflict of Laws

Whereas the concept of public policy may be allowed greater latitude in its application to purely domestic disputes, there is concern that allowing a similar latitude in its application to international and interstate conflict of laws problems would be undesirable. For one, there are questions whether it would not be an untenable affectation of superior virtue for any state to strike down the laws of a sister state as being repugnant to its public policy.[82] A major interest in federalism in the United States is to weld the otherwise independent

76. *See supra* notes 64-71; *see also* Rosenberg v. Raskin, 80 Cal. App. 2d 335, 181 P.2d 897 (1947).
77. *Spense*, 22 Cal. at 343; *Gate City Creamery*, 103 Cal. App. at 373.
78. *See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988); Mallard v. Boring, 182 Cal. App. 2d 390, 396, 6 Cal. Rptr. 171 (1960).
79. *See* cases cited *supra* note 77.
80. Smith v. San Francisco & N.P.R. Co., 115 Cal. 584, 47 P. 582 (1897).
81. *See supra* notes 68-74.
82. *See* Beach, *supra* note 13; Biewend v. Biewend, 17 Cal. 2d 108, 113, 109 P.2d 701 (1941).

sovereign states into a coherent single nation.[83] Therefore, as a matter of federal interest, the use of public policy in interstate conflict of laws must of necessity be controlled. Similar checks may also be imposed on the use of public policy in international conflict of laws problems based on foreign policy considerations. Moreover, the elusiveness of and vagueness in the concept could work to undermine the first policy objective in the legal system if party expectations are easily frustrated by judicial recourse to the repugnancy doctrine. On the other hand, if the courts pay particular attention to these considerations, the concept of public policy may become a manageable doctrine serving a useful purpose. It is the purpose of the following section to examine the extent to which judicial opinions in California track or deviate from these concerns.

The use of public policy in interstate and international conflict of laws has generally been in the following broad subject areas: (1) choice of law, (2) choice of forum, (3) arbitration agreements, and (4) enforcement of judgments. While there are interesting subcategories of these subject areas, it appears useful to retain these general categories as an analytical framework. The following discussion will, therefore, focus on each general area.

A. *Choice of Law and Public Policy in California*

1. *Traditional Choice of Law*

Anyone vaguely familiar with the evolution of the choice of law process in the United States is almost immediately reminded of the constant battles among conflict scholars and the courts over the appropriate theory and the circumstances of its application.[84] Several

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83. In an influential article on the history and role of the Full Faith and Credit clause of the United States Constitution, Mr. Justice Jackson wrote that it was meant

> to federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition of public acts, records, and judicial proceedings. It was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states.

Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945); *see also* Kirgis, *supra* note 8.

84. The choice of law process in the United States has been described elsewhere as crowded and clouded by competing theories that have tended to confound and confuse some courts. *See* Yelpaala, *supra* note 15, at 255. It requires several pages to list and discuss all the choice of law theories in the United States. The following is only a small sample of the writing in

competing theories have emerged, encouraged by the lack of any binding federal mandate on an appropriate choice of law approach. Thus, theoretically, one could have fifty choice of law approaches in the United States. This potential and multiplicity in approaches by states is further complicated by the variations and persistent evolution of theories and approaches within states.

Few states can actually boast of consistency in doctrine, and California is not one of them. The courts in California have traditionally relied on the comity of nations theory for their choice of law process. When the traditional comity theories were invoked, the role of public policy in the choice of law was definite. However, when the court adopted governmental interest analysis, the role of public policy became doubtful. With the recent decision of the

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the area:

Traditional Approach: *See* BEALE, *supra* note 1; Cook, *The Logical and Legal Bases of the Confliction of Laws*, 33 YALE L.J. 457 (1924); Lorenzen, *supra* note 5.

Neo-Territorialist Approach, a version of the Traditional Approach: *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971).

Interest Analysis: *See* Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958) [hereinafter Currie, *Married Women's Contracts*]; D. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 MERCER L. REV. 629 (1984); Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the New Critics*, 34 MERCER L. REV. 593 (1983); Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 556 (1984); Brilmayer, *Legitimate Interests in Multistate Problems*, 79 MICH. L. REV. 1314 (1981).

Comparative Impairment: *See* Baxter, *supra* note 20; Horowitz, *supra* note 20.

Second Restatement: *See* Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679 (1963); Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501 (1983); Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case For Electicism*, 40 MO. L. REV. 407 (1975); Morris, *Law and Reason Triumphant or How Not to Review a Restatement*, 21 AM. J. COMP. L. 322 (1973).

Choice influencing considerations: R. LEFLAR, AMERICAN CONFLICTS LAW (3d ed. 1977); Robert, *Conflicts of Law: More on Choice Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

Functional Analysis: *See* WEINTRAUB, *supra* note 1; A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965).

True Rules: EHRENZWEIG, *supra* note 1; Ehrenzweig, *A Proper Law in a Proper Form: A "Restatement" of the "Lex Fori" Approach*, 18 OKLA. L. REV. 340 (1965).

In an interesting article, Professor Kay has explained how some lower courts in California have been confused about the concept of comparative impairment. *See* Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577 (1980) [hereinafter Kay, *Comparative Impairment*]. *See also* E. SCOLES & P. HAY, CONFLICT OF LAWS (1982) [hereinafter SCOLES & HAY]; W. RICHMAN & W. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS (1984); CRAMTON, CURRIE & KAY, *supra* note 1; W. REESE & M. ROSENBERG, CASES ON CONFLICT OF LAWS (1984); J. MARTIN, CONFLICT OF LAWS (1984); Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 582 (1983).

California Supreme Court in *Wong v. Tenneco*,[85] the court returned to comity and public policy. In view of these variations, no discussion of public policy in the California choice of law process will be complete without a historical review of the process. Such a review should examine and explain the continuing vitality, if any, of public policy in California choice of law disputes.

The role of public policy in the choice of law process in the United States is generally believed to be linked to the traditional conceptual apparatus for resolving conflict of laws problems.[86] At the hub of the conceptual apparatus was the principle of territorial sovereignty. According to the principles of territoriality, the jurisdiction of every state was limited to its territory. Its legislative jurisdiction was unlimited with respect to persons, things, activities, and events within its territory.[87] Conversely, no state law could have extraterritorial effect without contradicting these territorial principles.[88] When a court was seized of a dispute with foreign elements or a choice of law question, it had to find a solution that was consistent with the received territorial principles. One solution was to enforce only the rights created under foreign law. This solution was advanced by Professor Beale in his writings and as rapporteur for the First Restatement of Conflict of Laws.[89] According to Beale, the task of a court faced with a choice of law problem was not to apply foreign law, but merely to enforce the right created under the foreign law in question.[90] The foreign law created both a right that vested in the plaintiff and an obligation that attached to the defendant. Thus, the forum was called upon to assist the plaintiff in finding that which he owned—the vested right.[91] The enforcement of vested rights was

85. 19 Cal. 3d 126, 702 P.2d 570, 216 Cal. Rptr. 412 (1985).

86. One of the leading proponents of this theory was Lorenzen. *See* Lorenzen, *supra* note 5; Goodrich, *supra* note 5.

87. Territorialist principles were developed by jurists in both Europe and the United States. The Dutch writer Ulric Huber influenced American thought on the subject. For a discussion of Huber's views, *see* Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375 (1919); E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 163-66 (1947). Another territorialist was Justice Story, the United States jurist. *See* T. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 18, 20 (1841) [hereinafter STORY]; DICEY, *supra* note 1.

88. *See* authorities cited *supra* note 87.

89. The First Restatement of Conflict of Laws conceived of the choice of law problem as the enforcement of foreign created rights. *See* BEALE, *supra* note 1, at 65; RESTATEMENT OF THE LAW OF CONFLICT OF LAWS §§ 47-49 (1934). *See also* Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 7 (1944) [hereinafter Rheinstein] (discussing the creation of vested rights).

90. BEALE, *supra* note 1, at 64-65.

91. Rheinstein, *supra* note 89, at 7-9. *See also* Alabama Great Southern R.R. Co. v. Carrol, 97 Ala. 126, 11 So. 803 (1892).

then analytically consistent with the notion of territorial sovereignty and co-equality of sovereigns.

Vested rights theoreticians then believed that certain *a priori*, self-evident principles of rights embodied in the common law could lead to the deduction of comprehensive rules applicable to every conceivable situation in the choice of law process. The First Restatement rules were designed to achieve precisely this objective. To determine the applicable law, a court was required to simply determine the jurisdiction within which an event or occurrence took place. If the laws of that jurisdiction created a right, the forum was required to enforce that right. If on the other hand no right was created, then the plaintiff's claim would fail accordingly.[92]

Even though Beale's system contained rules tightly drawn up and compelled by the laws of logic, in the eyes of many, it failed to measure up to the task assigned to it. It soon became apparent that the First Restatement rules were not comprehensive enough to meet the demands of all conceivable situations. Indeed, in a complex socio-economic and political environment, the expectations of the First Restatement were probably unrealistic. The ink on the First Restatement was barely dry when it was assaulted by scholars of the American Realistic movement.[93] Professor Lorenzen, for one, argued that public policy in the choice of law process was a necessary consequence of the impercipience and rigidity of the First Restatement.[94] According to Lorenzen, "realizing that the logical deductions from *a priori* theory could not be justified in all cases, theoretical writers have allowed the ordinary rules, which cannot govern on 'principle,' to be set aside under certain circumstances by the rules of public policy or public order."[95]

Thus, public policy was to be, and has become, an inevitable and powerful escape valve for the courts. Nevertheless, it is doubtful whether Lorenzen's claim can be scientifically substantiated. Public policy is such a complex and elusive concept that seems to have

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92. *See* RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 377 comment a (1934); BEALE, *supra* note 1, at 1286-87.

93. One of the notorious attacks on the First Restatement was by Cook. *See* Cook, *supra* note 6. *See also* Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading of Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027 (1949).

94. *See* Lorenzen, *supra* note 5, at 746.

95. *Id.*

predated the vested rights theories, at least as formulated by Beale.[96]

Notwithstanding criticism, the vested rights approach took a strong hold on several states.[97] California courts, however, relied on a competing traditional choice of law theory advanced by Story.[98] Story, like Beale, was a territorialist. His theories were also built on territorial sovereignty as a foundation.[99] He nevertheless, and contrary to Beale, concluded that foreign law could be applied in another state on the basis of comity of nations. He developed certain maxims to explain the operation of his comity theory. First, he agreed with Beale that the law of no state could, *ex proprio vigore*, have extraterritorial effect.[100] Whatever effect such laws had in another country was determined by the voluntary consent of such a state as expressed through its laws and municipal regulations.[101] Thus, the concept of comity of nations was closely tied to the consent and voluntary application of foreign law. But Story recognized the public policy exception in the following words:

> No nation can be justly required to yield up its own fundamental policy and institutions, in favor of those of another nation. Much less can any nation be required to sacrifice its own interests in favor of another; or to enforce doctrines which, in a moral or political view, are incompatible with its own safety, or happiness, or conscientious regard to justice and duty. In the endless diversities of human jurisprudence many laws must exist in one country, which are the result of local or accidental circumstances, and are wholly

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96. The attack by Lorenzen and other scholars in the realist movement on public policy was not limited to its use in the choice of law process. It was but part of a much more comprehensive realist challenge to analytical jurisprudence, scholasticism, and the formalist formulation of the legal system and its inherent attributes. *See supra* note 93. According to the realists, if all phenomena were dealt with *a posterioi*, thereby stripping law of all fictions, the need for public policy would disappear. In other words, if the courts were not required to resolve disputes with pre-ordained legal principles, there would be a legal solution to each dispute without the necessity to rely on the escape device of public policy. This criticism applies to both domestic and interstate or international disputes. While the debate between the formalist and the realist is interesting, it can not be properly engaged in here given the specific nature of our task.

97. A number of scholars have, in recent times, examined the adoption and application of the various types of choice of law theories in the United States. In an authoritative chart, Professor Kay demonstrated that the First Restatement approach is still well and alive in several states. *See* Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 591-92 (1983). For another useful chart, *see* Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1172-73 (1987). *See also* Symeonides, *Choice of Law in the American Courts in 1988*, 37 AM. J. COMP. L. 457, 459-61 (1989) (addition to the choice of law geography).

98. STORY, *supra* note 87.

99. *Id.*

100. *Id.* at § 23.

101. *Id.*

> unfit to be ingrafted upon the institutions and habits of another.[102]

After a discussion of various types of non-traditional western legal systems and their laws, Story concluded that "there would be extreme difficulty in saying that other nations were bound to enforce laws, institutions or customs of that nation which were subversive of their own morals, justice or polity."[103]

Story's comity theory has influenced California courts for nearly a century. In the 1894 case of *Whitney v. Dodge*,[104] the issue was whether a trustee should be allowed to repudiate the trust and not be compelled to render account of the trust fund. The trust had been established under a testamentary disposition of property in Pennsylvania subject to certain conditions. These conditions were valid under Pennsylvania law but invalid under California law. Relying on a prior precedent and quoting extensively from Story, the California Supreme Court explicitly adopted the comity theory as its choice of law method. Holding that a trustee must be held to the terms of the trust and render an account, the court argued that mere difference in the law of the two states was not sufficient to hold the trust invalid.[105] In fact, the court thought it would be contrary to public policy to rule otherwise. The following passage sums up the court's rationale:

> It may be said, generally, that it would not be within the scope of a just and enlightened public policy to allow a trustee with trust funds in his hands, received under a will perfectly valid in another state, to avoid the trust, appropriate the funds to his own use, and defeat the beneficiaries, by the simple devise of coming to this state and bringing the funds with him.[106]

The case is important in terms of the tone the court set in the application of the repugnancy doctrine. *Whitney* stood for the proposition that the mere existence of a difference in law could not necessarily justify the use of public policy. In spite of the difference in law, the court found a common public policy of California and Pennsylvania favoring validating the trust. Moreover, the court employed public policy affirmatively to ensure justice and fairness.[107]

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102. *Id.* at § 25.
103. STORY, *supra* note 87, at § 25.
104. 105 Cal. 192, 38 P. 636 (1894).
105. *Id.* at 201.
106. *Id.*
107. *Id.*

This somewhat restrained and reasonable application of public policy by the *Whitney* court seems to have influenced subsequent decisions. The influence was not evident, however, until 1932, in *Loranger v. Nadeau*, when the California Supreme court adopted a clear formulation of public policy.[108] *Loranger* was a guest statute case. The defendant and plaintiff, both California residents, were involved in an accident in Oklahoma. The question was whether it was contrary to California public policy to allow the plaintiff to recover under the standard of ordinary negligence under Oklahoma law as opposed to the gross neglicence standard of California. Relying explicitly on the formulation of public policy by Judge Cardozo in *Loucks v. Standard Oil*,[109] the California Supreme court rejected the public policy argument.[110] Writing for the court, Justice Shenk argued that allowing a California plaintiff to recover under those circumstances could hardly be said to violate any fundamental principles of justice or California public policy, and no good morals seemed to be involved.[111] The emphasis of the court in allowing the use of the repugnancy doctrine only in significant cases of deeply rooted values, is reflected in its choice of law decisions. In cases where some fundamental public policy was at stake, the court allowed the repugnancy doctrine to defeat the foreign law. Such cases are, however, not many.

In cases where the repugnancy doctrine has been properly invoked, it generally involved some conduct, transaction, or activity of social or public significance. The conduct or activity should generally pose a serious threat to the basic values of society or to the public confidence in fundamental morality. Certain disputes tend to raise these questions more easily than others. For instance, disputes concerning family issues such as bastardy, loss of affection, and polygamy tend to attract the public policy exception. Contracts for prostitution or gambling related transactions also evoke the public policy exception. There are, however, several other disputes involving general contractual rights, torts, wrongful death, or strict liability questions, where the public policy exception has been invoked but with less success.[112] The discussion of California conflict of laws

108. 215 Cal. 362, 10 P.2d 63 (1932).
109. 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918), cited in *Loranger*, 215 Cal. at 366.
110. *Loranger*, 215 Cal. at 367.
111. *Id.*
112. For limitations on damages, *see* Victor v. Sperry, 163 Cal. App. 2d 518, 329 P.2d 728 (1958), where it was held that it was not contrary to the public policy of California or

cases will be limited to these categories, using a few cases as illustrations.

The first category of cases in which public policy was successfully invoked to reject the application of foreign law was in the family law arena. So important was marriage to society that the common law adopted rather harsh and severe rules restricting the legal rights of bastards or illegitimate children.[113] Such rules were contrary to the basic principles of individual responsibility enshrined in the American legal system. The law would generally impose legal responsibility only on actors. In this case, the law permitted innocent children to suffer for the sins of their parents. The inequity and injustice of the law of reverse vicarious liability were, nevertheless, rationalized as necessary to compel the parents to curb their extramarital amorous adventures.[114]

The California Supreme Court first addressed this question in *Blythe v. Ayres*.[115] At stake in *Blythe* was the inheritance of the vast wealth of Thomas H. Blythe. Blythe, a California resident, died intestate and was survived by several relatives and an illegitimate daughter. The issue was whether a postnatal legitimation by Blythe was valid under California law such that the daughter would inherit his property. If the strict common law rules applied, the daughter would have been entitled to inherit nothing. After an exhaustive discussion of English authorities and decided cases, the court con-

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injurious to the welfare of its people to enforce limitations imposed by the law of Mexico on the amount of damages. It was, however, further held that it was contrary to California public policy to impose liability without fault. *Id.* at 524-26. *But see* Rubin v. Schupp, 127 F.2d 625 (9th Cir. 1942) (public policy argument rejected in wrongful death action).

113. *See infra* notes 115-20.

114. *Id.* There has always been concern about the inconsistency of vicarious liability with other common law principles. For instance, the basic premise of legal responsibility is that each individual should be responsible for his actions. Thus, D. W. Holmes, Jr., queried whether vicarious liability was not against common sense in the following words:

> I assume that common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility—unless, that is to say, he has induced the immediate wrong-doer to do acts of which the wrong, or, at least, wrong, was the natural consequence under the circumstances known to the defendant. . . . I therefore assume that common sense is opposed to the fundamental theory of agency, although I have no doubt that the possible explanations of its various rules which I suggested at the beginning of this chapter, together with the fact that the most flagrant of them now-a-days often presents itself as a seemingly wholesome check on the indifference and negligence of great corporations, have done much to reconcile men's minds to that theory.

Holmes, Jr., *Agency*, 5 HARV. L. REV. 1, 14 (1891).

115. 96 Cal. 532, 31 P. 915 (1892). *Blythe* involved several relatives of Thomas H. Blythe, decedent, who sought and fought vigorously to disinherit decedent's daughter so that they could share in his vast wealth. *Id.*

cluded that under both California and English law Blythe could, by a subsequent conduct, change the status of his daughter.[116] In modern governmental interest analysis, that would have been a false conflict since the policies behind both the English and California laws would have been the same. The California Supreme Court addressed the case as a purely domestic dispute regarding the interpretation of a California statute. The meaning of this statute, the court concluded, should not be affected by the policies of foreign countries. According to the court:

> Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this state authorize and encourage it, and there is no principle upon which California law and policy, when invoked in California courts, shall be made to surrender to the antagonistic laws and policies of Great Britain[117]

It was held, therefore, that Blythe's conduct had legitimated the status of his daughter and that she was entitled to inherit her father's property.

The court's reaction to bastardy questions was much more direct in the case of *The Estate of Lund*.[118] The question raised in *Lund* was whether the stigma of bastardy was of such an indelible character that a Norwegian bastard could be cut off from his father's will even after a post-majority legitimation by the father. Relying on its opinion in *Blythe*, the court stressed several times that the California civil code provisions of legitimation were a statement of the state's public policy. According to the court, the legislature had adopted a policy which repudiated the common law rule compelling the sins of the father to be visited on the children.[119] To the extent that the California statute was a statement of its public policy favoring legitimation, the court held that it would be contrary to such public policy to limit legitimation to only minor children, or to allow contradictory foreign laws to apply.[120]

Though questions of bastardy seem to be issues of the past, these cases illustrate the lead that California and its courts took in dealing with family law questions in a liberal fashion. It seemed of fundamental importance, in trying to encourage traditional family values,

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116. *Id.* at 576.
117. *Id.* at 575.
118. 26 Cal. 2d 472, 159 P.2d 643 (1945).
119. *Id.* at 480.
120. *Id.* at 491-92.

that children or innocent individuals did not become sacrificial lambs. A liberal interpretation of the statutory provisions allowing inheritance by otherwise "disinherited" children was guided by the public policy of fairness and justice in the operation of basic legal principles.

Similarly, the courts of California seemed to have found an overriding and fundamental public policy interest in cases involving loss of affection. In *Thome v. Macken*,[121] the plaintiff, an Oregon resident, sought to recover damages for loss of affection. Even though the claim was actionable under Oregon law, and notwithstanding the mandate of Article IV of the United States Constitution on privileges and immunities, the California Court of Appeals rejected jurisdiction over the case on public policy grounds.[122] At issue was the question whether a California statutory provision denying causes of action for alienation of affection was a statement of California public policy.

Since the legislature had expressed no views on the issue, the court sought help from states with similar statutes. It examined the policy rationale behind those statutes. It found that the cause of action for loss of affection was rejected because it was conducive to extortion, blackmail, fraud, and havoc. It would cause society greater injury than benefit.[123] From this analysis, the court concluded that the California statutory provisions were similarly an expression of public policy compelling rejection of jurisdiction over the dispute.[124] However, in another family law case addressing the question of whether the wives of a polygamous husband could inherit his California property upon death intestate, the court held that it was not against California public policy for the wives to share the property equally.[125] While California does not recognize polygamous marriages celebrated within its borders, it does not consider it against its public policy to recognize foreign polygamous marriages.

The position of California courts on issues involving gambling transactions and debts, however, is not clear. Two lines of cases seem to have evolved on gambling questions. One line of cases holds gambling to be *contra bonos mores* and, hence, unlawful.[126] When a California court is called upon to enforce a foreign gambling

121. 58 Cal. App. 2d 76, 136 P.2d 116 (1943).
122. *Id.* at 84.
123. *Id.* at 82.
124. *Id.* at 83-84.
125. Estate of Bir, 83 Cal. App. 2d 256, 262, 188 P.2d 499 (1948).
126. Braverman v. Horn, 88 Cal. App. 2d 379, 198 P.2d 948 (1948); Lavick v. Nitzberg, 83 Cal. App. 2d 381, 188 P.2d 758 (1948); Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708 (1907).

contract or debt, it is supposed to reject enforcement on public policy grounds. There is recent authority, nevertheless, for the view that gambling does not necessarily implicate any California public policy. Confronted with this question in *Nevcal Enterprises Inc. v. Cal-Neva Lodge, Inc.*,[127] the court, relying on Cardozo's formulation of public policy, rejected the notion that California could act piously about gambling when it authorizes various forms of gambling. California courts, it was argued, could not be shocked on the ground of public morals when called upon to enforce a contract for the operation of licensed casinos in Nevada.[128] On the other hand, in the case of gambling debts, the courts have taken a longstanding position that it is against the public policy of California to enforce gambling debts.[129] When, for example, a gambler was allowed to cash checks for gambling purposes in a Nevada casino, it was held that these check transactions were illegal and could not be collected on public policy grounds.[130] The continuing vitality of the public policy excep-

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127. 194 Cal. App. 2d 177, 14 Cal. Rptr. 805 (1961).

128. *Id.* After examining its precedents on public policy, the court concluded as follows:

> In these modern days Californians cannot afford to be too pious about this matter of gambling. Stud poker is contrary to good morals (so it seems), but not draw poker or draw low ball poker, although they actually constitute gambling. This situation grows out of the concept that the "determination of public policy of states resides, first, with the people as expressed in their Constitution and, second, with the representatives of the people—the state Legislature." So draw poker, not being declared illegal by statute, is held to be lawful. Hence some of our less ascetic communities license draw poker parlors which are conducted to the edification of the citizenry and presumably to the profit of the treasury and the taxpayer.
>
> Horse racing was said in *Hankins v. Ottinger* to contravene good morals, and it was held that bets thereon are unenforceable. But the legislature by enactment of the Horse Racing Act of 1933 and the People by constitutional amendment ratifying said law, have reversed that policy with respect to such gambling done upon the licensed premises of a racing association and through pari-mutuel machines. The state licenses qualified applicants to conduct horse racing and betting thereon if made within the track enclosure and through the pari-mutuel betting machines, i.e., where the customers bet with each other and not with the house. If made inside the fence the bet is lawful and winnings recoverable. But if made outside, bets are still illegal and the proceeds not recoverable. All persons other than those specifically mentioned in section 19572 (such as known bookmakers or touts) have a right to enter the race track and indulge freely in betting. The state itself has a large interest in the enterprise through fees collected by it based upon percentages of the betting pool ranging from 5 per cent to 8 per cent of the gross, also through its right to half of the breakage.
>
> County fairs are placed in the same status as licensed race tracks for betting on horse races (citations omitted).

Id. at 180-81.

129. *See* Hamilton v. Abadjian, 30 Cal. 2d 49, 51, 179 P.2d 804 (1947), where it was held that the courts of California will not lend their support to the collection of gambling losses as contrary to California public policy.

130. Lane & Pyron Inc. v. Gibbs, 266 Cal. App. 2d 61, 65, 71 Cal. Rptr. 817 (1968).

tion in gambling debts is doubtful for two reasons. First, the exception is narrowly drawn to require that gambling advances be made for gambling purposes and be used for gambling.[131] Second, with the advent of the California lottery, California courts may follow the reasoning of the court in *Nevcal Enterprises Inc.*, and enforce gambling debts. Such a position will be consistent with the legal obligation of the Lottery Commissioner to pay all winners. It would seem inconsistent to have a public policy that encourages gambling, but discourages seriously the collection of gambling related debts. However, if the underlying gambling transaction is illegal, then it would be against the public policy of California to enforce any debts arising from the transaction.[132]

2. *Wong v. Tenneco and Interest Analysis*

According to the critics, public policy was an inevitable outcome of the rigidity of the traditional approach to the choice of law process. The process produced predetermined but sometimes undesirable results. To avoid these results, courts relied on the public policy exception. Modern choice of law theories were designed to eliminate, in part, the use of public policy as an *escape device*. One of the arguments advanced by proponents of interest analysis was that it would take into account the policies behind any particular law, thereby removing the necessity to rely on the public policy exception.[133] The actual operation of interest analysis and other modern choice of law theories seems to suggest that public policy continues to influence the choice of law process. Some courts, supposedly using modern choice of law theories, seem to retreat to the traditional analysis and the public policy exception when confronted with difficult choice of law questions. Other courts find ways to inject public policy analysis into their modern choice of law decisions. The recent public policy decision by the California Supreme Court in *Wong v. Tenneco*[134] is an example of the behavior of courts.

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131. *Id.* at 65, 68-69.

132. *Id.* at 65. Moreover, the enforcement of illegal transactions would run contrary to public policy because it would undermine the role of the courts and result in loss of confidence in the judicial system. *Id.*

133. *See* Currie, *Married Women's Contracts, supra* note 84; Currie, *supra* note 6. *See also* Hill, *Governmental Interest—and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Symposium, *Comments on Babcock v. Jack, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963) [hereinafter *Comments on Babcock*].

134. 39 Cal. 3d 126, 702 P.2d 570, 216 Cal. Rptr. 412 (1985).

As already noted above, this decision raises several questions about the explicit return of the public policy exception in California choice of law doctrine.

Wong involved a dispute between two California residents over their contractual rights in a failed Mexican foreign investment venture. The plaintiff, Wong, set up his vegetable growing operations in Mexico. It was alleged that he used Mexican front men in violation of Mexican law prohibiting foreign ownership of land.[135] Through a series of contracts with the defendant Tenneco, Wong received financial support in exchange for the defendant's exclusive right to market Wong's produce and to manage his business. The venture collapsed upon pressure from the government of Mexico for taxes, the Mexican front men, and other creditors. Tenneco severed its relations with the plaintiff and remitted profits from the operations to the Mexican front men. The plaintiff sued for breach of contract and misrepresentation. The case was tried before a jury at the trial court level. The jury returned a substantial verdict in favor of the plaintiff and a smaller amount for the defendant on a counterclaim. Notwithstanding the verdict, the trial judge ruled that the plaintiff could not recover because of unclean hands. The court looked beyond the simple contract and examined the underlying farming transactions giving rise to the contractual claims. Finding them tainted with illegality, the trial court denied the remedy on public policy grounds.

A sharply divided California Supreme Court affirmed the lower court's opinion by a narrow margin. One source of the disagreement

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135. *Id.* The illegality of the failed Mexican operations was debated by the court. The disagreement was based in part on the interpretation of Article 27 of the Mexican Constitution of 1917 which states in part:

> Art. 27
> I. Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mines or of waters. The state may grant the same right to foreigners, provided they agree before the Ministry of Foreign Affairs to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of noncompliance with this agreement, of forfeiture of the acquired property to the Nation. *Under no circumstances may foreigners acquire direct ownership of lands or waters within a zone of one hundred kilometers along the frontiers and of fifty kilometers along the shores of the country* (our emphasis).

Id. at 129 n.2.

The language of Article 27 of the Mexican Constitution of 1917 is subject to different interpretations on the question of illegality. The plaintiff, however, admitted in court that the farming operations were illegal under Mexican law. In addition to the constitutional provisions, the court also dealt with the role of Mexican foreign investment laws in the failed venture by examining *The Law for the Promotion of Mexican Investment and Regulation of Foreign Investment* (Mar. 9, 1973). *Id.*

was the characterization of the dispute. If, according to the dissent, the case were characterized as a California dispute between two of its residents over a contract to be performed in California, no choice of law questions would have arisen.[136] Besides, the contract was lawful under California law. This fact would have, *prima facie*, eliminated the application of the public policy exception. The majority, however, found the contract claim to be of secondary importance. Agreeing with the lower court, the majority argued that the underlying Mexican farming operations of the plaintiff formed the centerpiece of the contractual claims.[137] By shifting the focus of the case to the farming operations, the majority found a choice of law question to decide. How this choice of law issue was resolved was even more puzzling than the characterization of the dispute. Starting with *Reich v. Purcell*,[138] and following with several of its earlier choice of law decisions,[139] the California Supreme Court made a decided shift away from its traditional comity doctrine to modern governmental interest analysis.[140]

The court, in recent prior decisions, adopted its own version of interest analysis, the comparative impairment doctrine. Applying this concept in the case of *Bernhard v. Harrah's Club*,[141] the court explained that comparative impairment requires the forum, in the event of a true conflict, to apply the law of the state whose interests would be most impaired if its policies were subordinated to those of the other state. In an earlier decision, the court unanimously reaffired the application of the comparative impairment doctrine to choice of law disputes.[142] If there were a choice of law question to be resolved,

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136. *Id.* at 142-44.

137. *Id.* at 133 n.8.

138. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

139. *See generally* People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957); Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961) (California Supreme Court applied interest analysis).

140. According to interest analysis, the forum, in determining a choice of law question, must take into account the underlying policies behind the laws of all states with a legitimate and competing interest in having their laws apply. *See* Currie, *Married Women's Contracts*, *supra* note 84. The theory of interest analysis divides choice of law problems into various categories: (1) false conflicts, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S. 2d 743 (1963); (2) true conflicts, Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964); (3) apparent true conflicts, People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 906, 12 Cal. Rptr. 266 (1961); (4) the unprovided for case, Erwin v. Thomas, 264 Or. 454, 506 P.2d 494 (1973).

141. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976). The California comparative impairment approach seems to have been significantly influenced by two conflicts scholars and their contributions to the field. *See* Baxter, *supra* note 20; and Horowitz, *supra* note 20.

142. Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

one would have then expected the court to apply the comparative impairment doctrine. However, without much explanation, and with only a passing reference to interest analysis in a footnote, the majority returned to the traditional comity doctrine established in 1894.

Relying on the comity principle, the court held that Mexican law governed the dispute. It also held that the applicable Mexican law was not so antagonistic or prejudicial to California public policy or to recognized standards of morality as to negate its application.[143] But why should Mexican law govern? The majority found support in yet another old and well established choice of law principle, the situs rule.[144] According to this rule, questions relating to the control of real property are governed by the law of the place where such property is located. Notwithstanding the fact that Mexico, but not California, restricted foreigners from owning certain types of property, this was not a sufficient reason for the application of the California public policy exception. On the contrary, the court found the plaintiff's Mexican farming operations to have been legal under California law. It nevertheless found the transactions in contravention of California public policy because they were purposefully designed to violate Mexican law.[145] The test for this public policy violation was the illegality of the plaintiff's activities. In an earlier decision, the court held that there existed a settled public policy against allowing a party to have its illegal contract enforced by a court of law.[146] It appears from this opinion, and from the cases relied on by the court, that the real test for the violation of California public policy was the illegality of the transactions rather than the place where they took place.[147] This use of public policy conforms with Justice Crompton's object and means test discussed in the *Egerton* case.[148] In some of the gambling cases discussed above, the transactions sued on were illegal in both California and the other states. Thus, a violation of California law and public policy could easily be

143. Wong v. Tenneco, 39 Cal. 3d 126, 136, 702 P.2d 570, 216 Cal. Rptr. 412 (1985).

144. One of the most entrenched principles in conflict of laws is the situs rule; *see, e.g., In re* Barrie's Estate, 240 Iowa 431, 35 N.W.2d 658 (1949) (holding situs of real property determines validity or revocation of will). The situs rule has been the subject of criticism and evasive schemes in the hands of creative litigants. *See, e.g.,* Baxter, *supra* note 20, at 15-17; Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095 (1965); Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 STAN. L. REV. 1 (1967).

145. *Wong*, 39 Cal. 3d at 137-38.

146. *Id.* at 135.

147. *Id.*

148. Egerton v. Brownlow, [1853] 10 Eng. Rep. 359, 417.

found.[149] In this case, the court extended the public policy concern to cover foreign illegalities. If the plaintiff cannot establish his claim without relying on an illegal foreign transaction, the courts of California will not lend their support to the enforcement of such a claim.

The apparent retreat from the comparative impairment and use of public policy deserves some explanation. It seems of importance to the court that the plaintiff deliberately engaged in a scheme to frustrate the constitutional provisions of Mexico. The court must have found the evasive scheme so extraordinarily offensive that it felt compelled to condemn it in no uncertain terms. The laws of Mexico are not unique in their attempt to control the behavior of foreign investors and to regulate access to natural resources.[150] Such laws are rampant, and the behavior of the plaintiff was not atypical. It is well established that many foreign investors, when confronted with similar restrictive laws, resort to various evasive schemes.[151] Deliberate evasive conduct by foreign investors is likely to be condemned outright by most governments and local courts as illegal and contrary to public policy. Similarly, there are federal and state laws in the United States prohibiting evasive schemes, dubious and manipulative transactions, and other forms of illegality in investment behavior.[152] The federal anti-bribery law, for example, condemns foreign conduct as illegal even if such conduct is not illegal in the foreign country.[153] The unequivocable condemnation of the conduct of the plaintiff in *Wong* should be seen as serving several purposes. It may be a warning to American investors abroad that flagrantly

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149. *See supra* notes 123-29.

150. For a discussion of such laws in other countries, *see* Yelpaala, *The Impact of Industrial Legislation on the Behavior of Multinational Enterprises and Labor in the Industrializing Countries of East and Southeast Asia*, 6 MICH. Y.B. INT'L LEGAL STUD. 383 (1984). A valuable contribution to the subject by a Nigerian scholar relying on decided cases was made by Fabunmi, *Indigenisation Law as a Means of Economic Control: The Nigerian Experience*, 5 Y.B. AFR. L. 13 (1984). *See also* Achebe, *The Legal Problems of Indigenization in Nigeria: A Lesson for Developing Countries*, 12 HASTINGS INT'L & COMP. L. REV. 637 (1989); UNCTC, NATIONAL LEGISLATION AND REGULATIONS RELATING TO TRANSNATIONAL CORPORATIONS (1983).

151. *See* sources cited *supra* note 150.

152. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 45 (1982 & Supp. III 1985); 16 C.F.R. § 13.315 (1986). *See also* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

153. *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a note, 78m(b), 78 dd-1, 78 dd-2, 78 ff(a) (1982 & Supp. III 1985)). There is a vast amount of intellectual commentary on the Foreign Corrupt Practices Act. *See generally* Herlihy & Levine, *Corporate Crisis: The Overseas Payment Problem*, 8 LAW & POL. INT'L BUS. 547 (1976); McLanglilin, *The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis*, 46 FORDHAM L. REV. 1071 (1978); Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 210 (1987).

illegal foreign conduct will not be tolerated at home. It may also be a warning to investors in the United States that California law will not always provide a shelter for their foreign operations. The intensity of the public policy denunciation in this case also suggests that it could be extended to schemes within the letter of the law but clearly violative of its spirit. In international disputes, the public policy exception might even be used by the courts as a gesture toward the maintenance of friendly international relations. It must be noted, however, that since the dissent in this case was strongly worded, and since the court is constituted differently today, *Wong* may be viewed as an aberration.

The majority opinion nevertheless casts doubt over the continuing vitality of the comparative impairment approach. One conflict of laws scholar has noted that lower courts in California seem lost and confused about the application of the comparative impairment approach.[154] To such courts, the decision in *Wong* could constitute a convenient and compelling signal to retreat to the comity doctrine and the public policy exception. Given the occasional application of the comity doctrine by lower courts, the danger is real. Furthermore, *Wong* might be part of a growing concern over the degree of utility of modern American choice of law methods. The Supreme Court of California is not alone in this apparent retreat. At least two other State Supreme Courts have in the recent past discussed or used the public policy exception. Of importance is that these courts were supposedly applying modern choice of law methods.[155] While the

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154. Kay, *Comparative Impairment*, *supra* note 84.

155. *See* Comment, *Choice of Law: A Fond Farewell to County and Public Policy*, 74 CALIF. L. REV. 1447, 1465 (1986); Boardman v. United Services Auto. Ass'n, 470 So. 2d 1024 (Miss. 1985), *cert. denied*, 474 U.S. 980 (1985); Schultz v. Boy Scouts of America, Inc., 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985). It should be noted that *Wong* has not drawn as much attention as other trend setting cases. It is relegated to the position of a note case in one of the leading Conflict of Laws casebooks. *See* CRAMTON, CURRIE & KAY, *supra* note 1, at 276.

Concern over the re-emergence of the public policy exception in New York conflict of laws was addressed by a lower court in New York. *See* Feldman v. Acapulco Princess Hotel, 137 Misc. 2d 878, 520 N.Y.S.2d 477 (N.Y. Sup. Ct. 1987). In this case, the question was whether it was against the public policy of New York to apply the law of the place of the tort, Mexico, to determine damages for pain and suffering even though Mexico imposed a ceiling on such damages. New York had no such ceiling. The court lamented the popular view that New York public policy is believed to be often invoked to protect New York residents. After an examination of the case law and intellectual commentary, the court concluded that the "precise status of the public policy exception in New York . . . remains unclear." *Id.* at 484. The court suggested that to the extent of the existence of the public policy exception, it should be limited to the narrow formulation of Judge Cardozo in Loucks v. Standard Oil Co., 224 N.Y. 99, 110-11, 120 N.E. 198 (1918). The court concluded that it was not against New York public policy to apply Mexican law to the issue of damages. *Feldman*, 520 N.Y.S.2d at 488.

number of cases is very small, in a period of doctrinal uncertainty only one decision may be required to change views, as happened in *Jackson v. Babcock*,[156] the case that ushered in interest analysis.

Assuming, however, that *Wong* and the other cases fail to influence any return to the old methods, what is the role of public policy in the comparative impairment approach? Under the traditional vested rights or comity approaches, the forum first determines whether foreign law is applicable to the particular dispute. It may then defeat the application of such foreign law on public policy grounds. Under the comparative impairment approach,[157] the forum must first determine whether there exists a true conflict of laws by taking into account the laws, the facts, and the policies behind the laws. In the event that two or more states have a legitimate interest in having their laws and policies govern a particular issue, the forum would be faced with a true conflict of laws problem and could apply its own law. While the process calls for the incorporation of legislative policies, it does not necessarily always involve public policy as discussed here. In other words, to the extent that all laws and common law principles are not declaratory of public policy,[158] interest analysis may or may not involve public policy. When used properly, interest analysis may make the distinction between specific policy and public policy irrelevant. The courts may, in fact, react differently.

In the Oregon case of *Lilienthal v. Kaufman*,[159] the Oregon Supreme Court held that in a true conflict of laws case the forum could apply its law on public policy grounds. In *Lilienthal*, an Oregon spendthrift entered into a contract with a California resident plaintiff. Not only was the contract entered into in California, but it was also to be performed there. The contract was enforceable under the laws of California but voidable under an Oregon spendthrift statute. Under all applicable choice of law theories, California law would govern this transaction. Upon examining the facts, the circumstances surrounding the case, and the relevant policies of the two states, the court, nevertheless, found a true conflict of laws problem. Oregon, but not California, had decided to subordinate its policy of favoring the validity and enforcement of contracts to that of protecting spendthrifts. Finding the interest of both states to be equally bal-

156. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). For a discussion of this case, *see Comments on Babcock*, *supra* note 133.

157. *See supra* note 141 and accompanying text.

158. *See supra* notes 68-71 and accompanying text (discussing *Foley*).

159. 239 Or. 1, 395 P.2d 543 (1964).

anced, the court held that the public policy of Oregon should prevail and that Oregon law should be applied.[160] What is perhaps even more significant is that the court examined the public policy of Oregon in determining the respective governmental interests in the dispute. To the extent that the Oregon statute expressed Oregon public policy, these concerns should naturally be applied in the governmental interest analysis. The Oregon statute, however, could have been an expression of Oregon specific policies on spendthrifts. Whether the controlling policy involved is public policy or specific policy, the results of a properly employed interest analysis process should produce similar outcomes. Considering that interest analysis only dictates that the forum can apply its law in the case of true conflict of laws, it still leaves open the possibility of the forum using public policy as an aid in making that decision.

Comparative impairment, on the other hand, may produce different outcomes. As noted above, comparative impairment calls for the application of the laws of the state whose policies would be most impaired if they were subordinated to those of the other state.[161] The process is an explicit invitation to weigh the competing policies of interested states as is apparent in the California Supreme Court decision in *Offshore Rental Co. v. Continental Oil Co.*[162] In the *Offshore* case, the court used various techniques to weigh and balance the policy interests of California and Louisiana in determining which law should govern a suit for the loss of services of the plaintiff's key employee. Holding that Louisiana's laws would govern, the court took into account the intensity of each state's interests in having its policy prevail. It examined the fit between the respective policies and the means by which the two states sought to advance such policies. In addition, it discussed the current vitality of the substantive legal rule in question. In doing that, it considered whether the rule in question was archaic or modern. It took into account the comparative pertinence of the governmental concerns of California and Louisiana.[163] This process may result in an implicit or explicit use of public policy as in the case of *Lilienthal.* If, when using interest analysis, the courts resort to public policy in difficult cases, it is not because the theory calls for it. Rather, the courts again find public policy a

160. *Id.* at 549.
161. *See supra* note 141 and accompanying text.
162. 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).
163. *Id.* at 167.

convenient device to resolve disputes when all other bases are inadequate or non-existent.

In summary, it seems almost impossible to eliminate public policy completely from the choice of law process. It has always been seen by the courts as a useful, if not convenient, instrument for dispensing justice. The attacks on the traditional vested rights and comity approaches to the choice of law process should not lead one to confuse certain fundamental issues. The attack does not question the notion that civil societies and their legal systems are built upon certain fundamental values, aspirations, and ideals. The idea that justice in the courts or the resolution of judicial disputes should be guided by, and not undermine, the fundamental values enshrined in any system seems appealing to common people and judges alike. It is, therefore, not surprising that the modern choice of law theories have been unsuccessful in completely keeping public policy from infiltrating the choice of law process. Like the ghost of Banquo, public policy will continue to appear when least expected, and, like the charmeleon, its colors will continue to change with its environment.

B. *Choice of Forum Clauses*

The justification for the use of public policy to defeat or modify the express will of the parties as to the method and place to resolve their disputes may depend critically on the reasons for the choices made, the subject matter of the dispute, the type of parties, or the characteristics of the chosen forum.[164] In a world of ever increasing economic interdependency, complex legal disputes frequently arise involving merchants of different nation states with yet different cultural, political, and ideological orientations. National courts, because of their parochial or sometimes myopic tendencies, are often unsuited for resolving complex international disputes.[165] The parties to an international dispute may be intensely suspicious of the neu-

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164. For a more extensive discussion of the reasons for forum selection clauses, *see* Yelpaala, *supra* note 15, at 209.

165. *See* Carbonneau, *American and Other National Variations on the Theme of International Commercial Arbitration*, 18 GA. J. INT'L & COMP. L. 143, 149 (1988) [hereinafter Carbonneau]; Carbonneau, *Transnational Litigation*, 18 INT'L LAW. 522 (1984); von Mehren, *Transnational Litigation in American Courts: An Overview of Problems and Issues*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 1 (J. Moss ed. 1985); G. DELAUME, 2 TRANSNATIONAL CONTRACTS, APPLICABLE LAW AND SETTLEMENT OF DISPUTES: A STUDY OF CONFLICT AVOIDANCE (1981).

trality of local tribunals in fashioning equitable solutions to disputes which often have political overtones.[166] Beyond the question of neutrality is concern over the competence of local tribunals.[167] The typical international dispute raises several complex jurisdictional and substantive legal questions. Unfamiliarity of the courts with the socio-economic and political complexities of certain subject matters may make them unsuitable for judicial resolution. Some local tribunals, induced by cultural arrogance, may not only adopt liberal or expansive rules of adjudicatory jurisdiction, but also apply their laws to any dispute before them.[168]

Notwithstanding these limitations on national tribunals, there is neither internationally acceptable judicial institutions with the power to resolve private international disputes nor established legal standards and substantive legal rules applicable to such disputes.[169] While we have marched into the era of the trading nation state, there is

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166. When the parties to an international dispute are intensely suspicious of the neutrality of an arbitration in each others national courts, a neutral forum becomes a necessity. For example, after the Iranian hostage crisis in 1980, both Iran and the United States sought to avoid this problem and to bring about a more efficient way of resolving their disputes through an international tribunal. *See* Stein, *Jurisprudence and Jurists' Prudence: The Iranian Forum Selection Clause and Decisions of the U.S.-Iran Tribunals*, 78 AM. J. INT'L L. 1 (1984). *See also* United States v. Iran, 1980 I.C.J. 3; Recent Development, *International Adjudication: Embassy Seizure*, United States v. Iran, 21 HARV. INT'L L.J. 748 (1980) (both discussing dispute resolution in international tribunals).

167. Certain international disputes may involve subject matter unfamiliar to the forum or may be so complex that it would be better to find another forum which is familiar with the character of the dispute and the law surrounding it. The Bhopal disaster typified one aspect of this problem. While one cannot question the competence of the courts of India, the accident caused questions about the capacity of the courts to handle complex and massive litigation. *See* Nanda, *For Whom the Bell Tolls in the Aftermath of the Bhopal Tragedy: Reflections on Forum Non-Conveniens and Alternative Methods of Resolving the Bhopal Dispute*, 15 DEN. J. INT'L L. & POL'Y 235 (1987); *see also* Galanter, *Legal Torpor: Why so Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273 (1985); (article in symposium on Bhopal tragedy); McCaffrey, *Accidents Do Happen: Hazardous Technology and International Tort Litigation*, 1 TRANSNAT'L LAW. 41 (1988) (discussing Bhopal tragedy).

168. The problem manifests itself most visibly in jurisdiction to prescribe cases. *See* Grunduan, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257 (1980); Toms, *The French Response to the Extraterritorial Applications of United States Laws*, 15 INT'L LAW. 585 (1981); Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145 (1975); Fugate, *Antitrust Jurisdiction and Sovereignty*, 49 VA. L. REV. 925 (1963); Samie, *Extraterritorial Enforcement of United States Antitrust Laws: The British Reaction*, 16 INT'L LAW. 313 (1982); Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981). Extraterritorial jurisdiction questions are becoming relevant in the European Economic Community. For example, a recent decision by the European Court of Justice allowed jurisdiction over foreign companies without any EEC presence. Re Wood Pulp Cartel: A. Ahlstrom Oy and Others v. E.C. Commission, 1988 E. Comm. Ct. J. Rep. ____, [1988] C.M.L.R. 901; Kuyper, *European Community Law and Extraterritoriality: Some Trends and New Developments*, 33 INT'L & COMP. L.Q. 1013 (1984).

169. *See* Carbonneau, *supra* note 165, at 145-49.

growing resistence to the exercise of jurisdictions over sovereign traders in foreign courts. The concept of sovereign immunity and the act of state doctrine are often seen by private litigants as unfair obstacles to justice and reasonable dispute resolution.[170] The need for internationally established alternative dispute resolution institutions is hardly in doubt. Yet, nation states have still to evolve such an institution to satisfy the needs of all the participants in the global market. Under these circumstances, it is hardly surprising that the parties to an international agreement would seek greater certainty in the settlement of future disputes. What is surprising then is that the public policy exception would be available to frustrate the search for certainty in international dispute resolution. If unrestrained party autonomy is respected, forum selection clauses may be used by individuals to undermine or subvert certain fundamental societal values. However, if public policy is an elusive concept used as a catch-all or a last resort doctrine in troublesome cases, local tribunals may indeed find it to be an attractive instrument for controlling party autonomy in international litigation. That appears to be the case in the United States, and in particular California, in forum selection cases.

Inspired by a protectionist and paternalistic attitude toward local residents, American courts, historically, found policy reasons to show little tolerance for choice of forum clauses.[171] The protective policies[172] of the state were considered so important that courts viewed them as not being subject to modification or change in private bargains.

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170. The debate over sovereign immunity has resulted in a number of Western industrialized countries passing statutes limiting the immunity of foreign sovereigns. For the United States, *see* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976). For a comprehensive collection of cases and statutes on sovereign immunity, *see* UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, U.N. Sales No. E/F.81.V.10 (1982); *see also* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978); Bachrah, *Sovereign Immunity in Belgium*, 10 INT'L LAW. 459 (1976); Weinschenk, *A Note on Sovereign Immunity and Judicial Remedies for Aliens in Courts of the Federal Republic of Germany*, 10 INT'L LAW. 467 (1976); Hamson, *Immunity of Foreign States: The Practice of the French Courts*, 27 BRIT. Y.B. INT'L L. 293 (1950); White, *State Immunity and International Law in English Courts*, 26 INT'L & COMP. L.Q. 674 (1977). For a most informative statement on sovereign immunity, *see* Sucharitkul, *Fourth Report on Jurisdictional Immunities of States and Their Property*, International Law Commission 34th Session, Geneva, 3 May—23 July 1982, U.N. Doc. A/CN.4/357 [and corr. 1] (1982).

171. For an extensive discussion, *see* Yelpaala, *supra* note 15, at 223-26. *See also* Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874) (United States Supreme Court took protectionist stand on enforcement of choice of forum clauses); Bergman, *Contractual Restrictions on the Forum*, 48 CALIF. L. REV. 438 (1960).

172. *See, e.g., Morse*, 87 U.S. (20 Wall.) at 451.

Forum selection clauses were seen as contrary to such protective policies, an ouster of the courts' jurisdiction, and, therefore, illegal.[173] In a landmark decision in *The Bremen v. Zapata Off-Shore Co.*,[174] the Supreme Court of the United States denounced this hostility and reduced the scope of the protective umbrella of American laws. The Court held that forum selection clauses are *prima facie* valid and should be enforced unless shown to be unreasonable under the circumstances by the party resisting them.[175]

Several reasons were offered why years of open hostility should be ended. The Court could find no justification for a parochial or paternalistic stance in the face of growing and constantly shifting patterns of asymmetrical dependence in international trade and investment.[176] It then called for a recognition of the changed conditions, and an expanded view of party autonomy in international business transactions. Party autonomy plays an important role in bringing some certainty to international transactions affected by a constantly shifting and expanding world trade system. Holding the parties to their bargain therefore serves an overiding policy interest. Thus, the Court concluded that forum selection clauses freely and voluntarily entered into in arms length transactions should be respected by the parties and enforced by the courts.[177] It noted, however, that forum selection clauses affected by fraud, undue influence, or overweening bargaining power would not be enforced.[178]

Another condition recognized by the *Bremen* Court for not enforcing forum selection clauses is public policy.[179] In other words, a forum selection clause that is violative of some fundamental public policy of the forum should not be enforced. When, though, may it be against the public policy of the forum to enforce a forum selection clause? The elusiveness of the concept, as demonstrated above, makes this question difficult to answer in any definite terms. There are,

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173. *See supra* note 171. *See also* General Acceptance Corp. v. Robinson, 207 Cal. 285, 289, 277 P. 1039 (1929); Beirut Universal Bank v. Superior Court, 268 Cal. App. 2d 832, 843, 74 Cal. Rptr. 333 (1969); General Motors Acceptance Corp. v. Codiga, 62 Cal. App. 117, 119, 216 P. 383 (1923).

174. 407 U.S. 1 (1971).

175. *Id.* at 10. In *Bremen*, the parties had agreed to resolve any dispute arising out of a contract to tow a drilling rig from Louisiana to Italy in the United Kingdom. One of the parties, in contravention of the contract provision, brought suit before a federal court in Florida. *Id.*

176. *Id.* at 9.

177. *Id.* at 10.

178. *Id.* at 15.

179. *Bremen*, 407 U.S. at 15.

nevertheless, three situations in which enforcing a forum selection clause may be held to be contrary to public policy. First, if the selected forum would apply its substantive law to the dispute in contravention of some fundamental public policy of the forum, then the forum selection clause should not be enforced.[180] Of significance here is the fact that the public policy argument does not arise from the choice of forum clause, but rather from the choice of law rules of the chosen forum. With the current spate of decisions by the U.S. Supreme Court supportive of party autonomy[181] and restricting the policy reasons for negating party autonomy, it is doubtful whether federal courts or state courts dealing with federal substantive law questions will follow this public policy exception. Second, the public policy exception is available if the choice of forum clause was inserted to avoid some mandatory statutory requirements of the forum.[182] Under such circumstances, the purposeful evasiveness of the clause should be considered contrary to public policy and unenforceable. Finally, it is suggested that where the transaction has no connection with the chosen forum either in terms of the subject matter, the parties, or the law, it would be contrary to the public policy of the forum and unreasonable to enforce the choice of forum clause.[183]

Prior to the *Bremen* decision, California courts, like those of most other jurisdictions, followed the rule that forum selection clauses were so offensive to the protective policies of the state as to be declared illegal.[184] The duty of the state to ensure that its residents have access to its courts was seen as overriding any express choices or preferences to the contrary shown by private parties to a contract. The *Bremen* decision was specifically limited to federal courts sitting in admiralty and is, therefore, only persuasive precedential value to sate courts. However, in a leading post-*Bremen* case, *Smith, Valentino & Smith Inc. v. Superior Court*,[185] the California Court of Appeals also halted this historical trend in California. Relying heavily on, and quoting extensively from the *Bremen* opinion, the California Court of Appeals held that the forum selection clause was valid and

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180. *See* Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133 (1982) [hereinafter Gruson].

181. *See infra* notes 206-12 and accompanying text.

182. Reese, *A Proposed Uniform Choice of Forum Act*, 5 COLUM. J. TRANSNAT'L L. 193, 201 (1966).

183. *Bremen*, 407 U.S. at 16-17.

184. *See* sources cited *supra* note 173.

185. 52 Cal. App. 3d 360, 124 Cal. Rptr. 917 (1975).

enforceable.[186] Acknowledging that California had a strong protective policy favoring the provision of a forum for its resident litigants, the court indicated that such protection could nevertheless be bargained away by residents in a forum selection clause.[187] Accordingly, the court maintained that forum selection clauses freely and fairly entered into in arms length transactions should be respected by the parties and enforced by the courts provided that enforcement would not be unreasonable, terribly inconvenient, or so burdensome as to deprive an individual of her day in court.[188]

On appeal to the California Supreme Court, the Court of Appeals' decision was affirmed.[189] The California Supreme Court also adopted and applied the *Bremen* rationale. Of importance is the court's treatment of the older cases which had considered forum selection clauses as an ouster of jurisdiction. The court tried to distinguish these cases, but concluded that to the extent of any inconsistency with their opinion in *Smith* those cases should not be followed.[190]

The *Bremen* exceptions have been the subject of an in-depth analysis elsewhere[191] and will not be repeated here. What is of particular interest to us is the public policy exception. Smith had argued that the forum selection clause which compelled him to sue Life Assurance in California was void on public policy grounds. This contention was based on old California cases which viewed forum selection clauses as ousting the jurisdiction of the court, and consequently void for public policy reasons. The California Supreme Court rejected this argument, and held that there was no strong public policy reason not to enforce the forum selection clause.[192]

It may be asked when a California forum may appropriately refuse to enforce a forum selection clause on public policy grounds. This question was partially addressed in *Hall v. Superior Court of Orange*

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186. *Id.* at 921-22. *Smith* concerned the validity and enforceability of a forum selection clause in an agency agreement between Smith, a California corporation, and a Pennsylvania Corporation, Life Assurance Company of Pennsylvania (Life Assurance). In the agreement, Smith had agreed to represent Life Assurance in California for the purposes of soliciting group insurance policies. The agreement contained a forum selection clause requiring the suit to be brought in Pennsylvania. *Id.*

187. *Id.* at 923.

188. *Id.* at 924-25. These were the conditions attached to forum selection clauses by the *Bremen* Court.

189. 17 Cal. 3d 491, 492, 131 Cal. Rptr. 374, 376 (1976).

190. *Id.* at 495-96.

191. Yelpaala, *supra* note 15, at 226-40.

192. *Smith*, 17 Cal. 3d at 495-96. For the Court of Appeals treatment of the public policy argument, *see* Smith, Valentino & Smith, Inc. v. Superior Court, 52 Cal. App. 3d 360, 365, 124 Cal. Rptr. 917, 923 (1975).

County.[193] The dispute in *Hall* involved an oil and gas limited partnership agreement between two Californians covered by the California Corporate Securities Law of 1968, a state enactment fashioned after the federal securities laws. Although no substantial or serious transactions took place in Nevada, the parties nevertheless had agreed to submit subsequent disputes arising from the transaction to Nevada courts and to Nevada law. The question raised before the court was whether the choice of forum and choice of law provisions should not be enforced on public policy grounds. Relying on *Smith,* it was held that a choice of forum agreement freely entered into would be enforced unless it was contrary to California public policy.[194]

The court considered the Corporate Securities Law of 1968 as an expression of an important California policy designed to protect investors.[195] So important is this protective policy, that the statute makes any agreement waiving its protection void. The effectiveness of such legislated protection may be undermined, however, by the parties to a contract through a choice of law provision. The court then concluded that the validity and enforceability of the choice of forum clause in *Hall* was contingent on the validity of the choice of law provision.[196] It had to determine the extent of the protective veil of the statute. According to the court, the protective policies included and mandated the application of California law and its concomitant nuances.[197] This was part of the protection that could neither be waived nor evaded by the parties in their contract. Since the court viewed the choice of law provision as an evasive device designed to qualify or even negate the statutory requirements and protection, it concluded that the choice of law clause could not be enforced on public policy grounds.[198] It followed then that the choice of forum clause would not be enforced. There was another reason why the choice of forum clause was unenforceable. Inasmuch as the California securities law was similar to federal law, the court relied on the well known U.S. Supreme Court decision in *Wilko v. Swan*[199] which held that the nonwaiver provisions of the federal securities act prohibited

193. 150 Cal. App. 3d 411, 197 Cal. Rptr. 757 (1983).
194. *Id.* at 416.
195. *Id.*
196. *Id.*
197. *Id.* at 418.
198. *Hall,* 150 Cal. App. 3d at 411.
199. 346 U.S. 427 (1953).

the enforcement of an arbitration agreement in a securities transaction.[200]

The reasons given by the California Court of Appeal for not enforcing the forum selection clause are, however, of doubtful durability given current trends. Typically, the validity of a forum selection clause does not depend on the validity of an accompanying choice of law clause. As pointed out by the concurrent opinion in *Hall*,[201] neither the *Smith*[202] opinion nor its supporting *Bremen*[203] case could support any linkage between forum selection clauses and choice of law provisions for determining validity questions. In one of its recent opinions, the U.S. Supreme Court argued that in determining the enforceability of an arbitration agreement in a contract with a choice of law provision, the Court should not be influenced by a prejudgment of the choice of law question.[204] If the California courts continue to rely on federal cases on party autonomy, the lasting validity of the opinion in *Hall* is in question. Besides, it is also doubtful whether a court in Nevada could constitutionally apply Nevada law since Nevada had no substantial contacts or aggregation of contracts with the dispute.[205] There was, therefore, no necessity, even on public policy grounds, to condition the validity of a forum selection clause on the results of a choice of law process.

Two other recent U.S. Superior Court decisions raise serious doubts that California courts will follow *Hall's* reliance on *Wilko*. In *Shearson/American Express v. McMahon*,[206] decided in 1987, the Court reexamined the basis of its 1953 decision in *Wilko*. The Court explained that *Wilko* was premised on several factors: (1) the suspicion about the desirability and competence of arbitration tribunals; (2) the view that the arbitration process was an inadequate medium for enforcing statutory claims; and (3) the inadequacy of the regulatory authority of the Securities Exchange Commission to supervise the arbitration of securities claims.[207] Things have changed significantly since *Wilko*.[208] Arbitration as an alternative dispute resolution

200. *Hall*, 150 Cal. App. 3d at 418.
201. *Id.* at 420-21.
202. 407 U.S. 1 (1971).
203. 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976).
204. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 629 (1985).
205. *See* discussion and sources cited *supra* note 8.
206. 482 U.S. 220 (1987). *See also* Jarvis, *The Use of Civil RICO in International Arbitration: Some Thoughts after Shearson/American Express v. McMahon*, 1 TRANSNAT'L LAW. 1 (1988).
207. *Shearson/American Express*, 482 U.S. at 231.
208. *Id.* at 233.

process has become widely acceptable, not only to Congress and the courts, but also to foreign legal systems.[209] Arbitral tribunals are now seen as competent and capable of resolving several claims, including statutory claims.[210] Moreover, the Commission now has expanded powers to supervise the procedures for arbitrating federal securities claims. In view of these changed conditions, the Court held that pre-dispute arbitration agreements of claims under the Exchange Act are enforceable.[211] The Court even went further in a recent 1989 decision, *Rodriguez v. Shearson/American Express, Inc.*, and overruled *Wilko*.[212] The issue raised in *Rodriguez* was whether the non-waiver provision of the Securities Act of 1933 rendered pre-dispute arbitration agreements of claims under the Act void. The Court concluded that "*Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions."[213] Overruling its own decision is not a task taken lightly by the Court, particularly since *Wilko* had been the controlling precedent for over three decades. In this case, the Court reasoned that the inconsistency and the need for uniformity in statutory interpretation compelled the result.[214]

In view of these developments, it is unclear whether the conclusion in *Hall*, that the non-waiver provisions of the California Securities

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209. That arbitration has become an international phenomenon can be demonstrated from the number of arbitration institutions worldwide. There are at least five institutions well known and quite active in international arbitration. They are:

(1) International Center for the Settlemlent of Investment Disputes (I.C.S.I.D.);
(2) International Chamber of Commerce (I.C.C.);
(3) American Arbitration Association (AAA);
(4) United Nations Commission on International Trade Law Arbitration Rules (Uncitral); and
(5) Stockholm Chamber of Commerce (SCC).

For academic commentary, *see* Farer, *Economic Development Agreements: A Functional Analysis*, 10 COLUM. J. TRANSNAT'L L. 200 (1971); Note, *Developments in International Commercial Arbitration, Latin America and International Arbitration Conventions: The Quandry of Non-Ratification*, 17 HARV. INT'L L.J. 131 (1976); Tiewul & Tsegah, *Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice*, 24 INT'L & COMP. L.Q. 393 (1975); Ryans & Baker; *The International Center for Settlement of Investment Disputes (ICSID)*, 10 J. WORLD TRADE L. 65 (1976); Note, *The Growing Consensus on International Commercial Arbitration*, 68 AM. J. INT'L L. 709 (1974); McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW. 211 (1979); Baker & Davis, *Establishment of an Arbitral Tribunal under the Uncitral Rules: The Experience of the Iran-United States Claims Tribunal*, 23 INT'L LAW. 81 (1989); de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982).

210. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 625 (1985).
211. *Shearson/American Express*, 482 U.S. at 238.
212. 109 S. Ct. 1917 (1989).
213. *Id.* at 1922.
214. *Id.*

Act make choice of forum clauses violative of public policy, to the extent of its reliance on *Wilko*, is still good law in California. The *Hall* decision could still be justified, however, on two grounds. First, by passing the California Corporate Securities Law, the California legislature may have intended to codify its protective policies by requiring the resolution of disputes under the statute in only California. If that is the legislative intent, and in the absence of any contradictory controlling federal law, the policies expressed in the California law would override the *Bremen* public policy exception to the extent of any inconsistency. Second, the *Hall* decision could still be justified on the basis of the deliberate evasiveness by parties of the courts in matters which may be purely domestic. In *Bremen*, the U.S. Supreme Court hinted that its decision might have been different had the dispute been a purely domestic conflict which the parties sought to resolve in some foreign distant forum.[215] In other words, neither *McMahon* nor *Rodriguez* can be read to negate the public policy and other exceptions available under *Bremen*, *Soler* and *Smith*.

IV. Arbitration Agreements and Public Policy

A. *The Federal Arbitration Act*

1. Historical Developments

The U.S. Supreme Court has described arbitration agreements as a species of forum selection clauses to which the *Bremen* rationale would apply.[216] Arbitration agreements, however, are sufficiently different and subject to a distinct body of law justifying the separate analysis to be undertaken in this section. One of the centerpieces to the enforcement of forum selection clauses is what the *Bremen* court described as "ancient concepts of freedom of contract."[217] The policy

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215. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1971).

216. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974). In this case, the Court said:

> An agreement to arbitrate before a specified tribunal is, in effect, a specified kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. . . . [W]e hold that the agreement of the parties . . . to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act.

Id.

217. *Bremen*, 407 U.S. at 11.

of freedom of contract may be subordinated to a much more fundamental policy of a higher order if enforcing the intention of the parties would produce a conflict. Arbitration agreements are likewise the result of an exercise of the freedom of contract. Is the right to choose arbitration so similar to the right to choose a forum that the same public policy qualifications should logically exist?

In the case of forum selection clauses, there is no controlling federal statute or uniform state legislation governing such clauses. Much of the current jurisprudence and policies are based on decisional rules by courts. The case of arbitration agreements, however, is vastly different. There is a controlling Federal Arbitration Act (FAA)[218] that is applicable to all states. The question then presented is whether in interpreting congressional intent as expressed in the FAA a court can find a legitimate basis for the public policy exception. In other words, when Congress has spoken on a particular subject, should, or do, the courts exercise judicial restraint in interpretations that would negate the result desired by Congress?

The starting point for an analysis of these questions is the FAA itself. Passed in 1925, the FAA was designed as a measure to control or halt decades of judicial hostility towards arbitration.[219] In 1970, the United States ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[220] and subse-

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218. 9 U.S.C. §§ 1-15 (1988).

219. No better proof of this can be found than congressional debates before the FAA was passed. One proponent of the bill, Rep. Graham of Pennsylvania, had this to say about the Act:

> This bill is one prepared in answer to a great demand for the correction of what seems to be an anachronism in our law, inherited from English jurisprudence. Originally, agreements to arbitrate, the English courts refused to enforce, jealous of their own power and because it would oust the jurisdiction of the courts. That has come into our law with the common law from England. This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to. It does not affect any contract that has not the agreement in it to arbitrate, and only gives the opportunity after personal service of asking the parties to come in and carry through, in good faith, what they have agreed to do. It does nothing more than that. It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.

65 CONG. REC. 1931 (1924).

220. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, *acceeded to with reservations* by the United States, Sept. 30, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention].

quently enacted the new Arbitration Act[221] in 1970 to comply with its obligations under the convention. With these actions, it is clear that Congress intended to treat arbitration agreements differently from other forms of forum selection agreements. Congressional intent is captured in section 2 of the FAA which states as follows:

> A written provision in any *maritime transaction* or *a contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such a contract, transaction, or refusal, shall be *valid, irrevocable,* and *enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*[222] (emphasis added)

The meaning and scope of section 2 has been the subject of an intense intellectual debate among scholars and judges for decades.[223] Notwithstanding the apparent clarity in the text of the quoted passage above, its meaning has been clouded by, and buried in the dust of the historical circumstances in which it was born. One area of disagreement has been construing the meaning of section 2 from the congressional intent behind it. Unfortunately, viewed from its historical context, the meaning of this section has been shrouded in several uncertainties to be discussed later. Certain congressional objectives are clear, however, from the legislative history of the statute.

It is incontestable that prior to the passage of the FAA there prevailed in the United States a "national policy" against enforcing arbitration agreements.[224] Jealous of their powers, judges viewed privately bargained alternative dispute resolution methods as an en-

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221. 9 U.S.C. §§ 1-15 (1988).

222. *Id.* at § 2.

223. Shortly after the passage of the Act there was a spate of intellectual commentary on its meaning and scope. For some of the notable commentaries, *see* Phillips, *Arbitration and Conflict of Laws: A Study of Benevolent Compulsion,* 19 CORNELL L.J. (1934); Baum & Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts,* 8 N.Y.U. L. REV. 238 (1931); Cohen & Dayton, *The New Federal Arbitration Law,* 12 VA. L. REV. 265 (1926); Poor, *Arbitration Under the Federal Statute,* 36 YALE L.J. 667 (1927); Stern, *The Conflict of Laws and Commercial Arbitration,* 17 LAW & CONTEMP. PROB. 567 (1952); Note, *Commercial Arbitration and the Conflict of Laws,* 56 COLUM. L. REV. 902 (1956); Healy, *Federal Arbitration Act,* 13 J. MAR. L. & COM. 223 (1982); Note, *Arbitrability of Disputes Under the Federal Arbitration Act,* 71 IOWA L. REV. 1137 (1986); Heilman, *Arbitration Agreements and the Conflict of Laws,* 38 YALE L.J. 617 (1929).

224. This national policy is best captured in the legislative history of the Act. *See supra* note 219. Professor Lorenzen eloquently described the national mood in the United States concerning arbitration agreements on the eve of the Act, stating that enforcing arbitration agreements was rejected practically by all the courts except those in Pennsylvania. *See* Lorenzen, *Commercial Arbitration—International and Interstate Aspects,* 43 YALE L.J. 716, 754 (1934) [hereinafter Lorenzen, *Commercial Arbitration*].

croachment on those powers. They concluded that arbitration agreements like other forum selection clauses ousted the jurisdiction of the courts, and, on that account, were contrary to public policy and unenforceable.[225] In most states, arbitration agreements were either invalid or revocable at any time before the grant of the award.[226] It is abundantly clear that Congress intended to eradicate the common hostility toward arbitration agreements by adopting an unequivocal national policy favoring arbitration agreements in two limited areas: maritime and interstate commercial transactions.[227] There is also little doubt that by making arbitration agreements "*valid*," "*enforceable*," and "*irrevocable*," Congress wanted to end another mischief. It intended to stop the nationwide discrimination against arbitration agreements and put them on the same footing with all other contracts.[228] Section 2 provides the same basis for the revocation of arbitration agreements as any other contract. Beyond these discernible objectives, it is unclear what else the 1925 Congress might have intended. Indeed, it is unclear whether Congress formed, or should have formed, any other intent at all on *all* other matters relating to arbitration.

It should be noted that our task here is not just a simple one of statutory construction. What meaning we discover in section 2 is likely to touch upon serious and complex questions of U.S. federalism. Whether or not California can use its public policy depends

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225. *See* Yelpaala, *Choice of Law and Forum Clauses in International Transactions in Common Law Jurisdictions*, in DRAFTING AND ENFORCING CONTRACTS IN CIVIL AND COMMON LAW JURISDICTIONS 209, 222 (K. Yelpaala, M. Rubino-Sammartano & D. Campbell eds. 1986) [hereinafter Yelpaala, *Choice of Law*]. The hostility towards choice of forum clauses can be seen in the U.S. Supreme Court decision in Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874), where the Court stated:

> Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. . . . That the agreement of the insurance company is invalid upon the principles mentioned, numerous cases may be cited to prove. They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.

Id. at 451. *See also* Reese, *A Proposed Uniform Clause of Forum Act*, 5 COLUM. J. TRANSNAT'L L. 193 (1966); Bergman, *Contractual Restrictions on the Forum*, 48 CALIF. L. REV. 438 (1960).

226. Lorenzen, *Commercial Arbitration, supra* note 224, at 755; *see also* Kochery, *The Enforcement of Arbitration Agreements in the Federal Courts:* Erie v. Tompkins, 39 CORNELL L.J. 74, 82 (1953) [hereinafter Kochery].

227. One of the earliest commentaries on the Act adressed congressional intent. *See* Committee on Comerce, Trade and Commercial Law, *The United States Arbitration Law and its Application*, 11 A.B.A. J. 153 (1925) [hereinafter Committee on Commerce].

228. *See* H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924), describing the purpose of the Act as making arbitration agreements enforceable.

on the answer to several choice of law questions raised by the Act.[229] As a start, what law did Congress intend to govern section 2 issues, state or federal law? Congress failed to fully and expressly state or articulate any legal principles governing the choice between state and federal law in matters concerning the FAA. Furthermore, did Congress intend to create a body of preemptive federal common law overriding all contradictory state law? There is no express language in the statute suggesting that it did. Nor is there any language indicating that it expected any existing federal common law to control. Second, to the extent that the FAA evidences a strong congressional intent to put arbitration agreements on the same footing as all other contracts, can one infer the grant of complete party autonomy? In other words, can the parties to an arbitration agreement freely choose any law, federal or state, to govern their rights and obligations? Finally, to what extent do these choice of law questions apply to international arbitration agreements?

2. *Choice of Applicable Law: Federal or State?*

a. The Erie *Doctrine and the Federal Arbitration Act*

With regards to the choice between federal and state law, as noted above, the issue is not just a simple one of determining congressional intent. It implicates fundamental questions of U.S. federalism, the separation of powers, and the power of federal courts to develop a general body of federal common law applicable to all states.[230] It is unclear from the plain meaning of section 2 whether Congress intended that the courts should apply an existing body of federal common law or create a new body of law pertaining to arbitration agreements. Furthermore, from the phrase, "such grounds as exist at law or in equity for the revocation of any contract," it is not clear that Congress ruled out the application of non-contradictory or

229. *See* Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1327 (1985) [hereinafter Hirshman].

230. The question of federal common law in U.S. federalism has gained importance and prominence in the current debate in Constitutional law and statutory interpretation. The literature is so voluminious that it will be fruitful only to cite a few here. *See, e.g.*, Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986); Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) [hereinafter Merrill]; Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543 (1988); Note, *Federal Common Law*, 82 HARV. L. REV. 1512 (1969); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Friendly, *In Praise of Erie—And the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

non-discriminatory state law public policy and other defenses to the enforcement of arbitration agreements.[231] Congress might have intended that state law govern these defenses to the extent that their application would not undermine the purpose of the FAA.

Determining congressional intent in this case is complicated by several factors. The FAA was enacted at a time when federal courts, under the regime of *Swift v. Tyson*,[232] could create federal rules of decision for cases within their jurisdiction. They had the power to announce general federal common law. Indeed, the prevailing policy under *Swift v. Tyson* was nationwide uniformity in diversity cases.[233] Federal courts applied federal common law rules or "general law" which prohibited the specific performance or enforcement of arbitration agreements.[234] Congress was not unaware of this fact, nor was it unconscious of the separation of powers enshrined in the United States Constitution. Congress was clearly determined to remove one "evil": the hostility towards arbitration agreements. Beyond this clearly articulated objective, it failed to determine expressly whether the FAA was a set of procedural or substantive rules applicable to both federal and state courts, and thus a preemption of the public policy defense under state law.

One way to resolve this ambiguity is to examine the interpretation of the New York Arbitration Act, which served as a model for the FAA. According to contemporary New York Court of Appeals opinions, arbitration agreements are remedial or procedural, but not substantive in nature. Almost single-handed, Judge Cardozo created and helped to entrench this interpretation of arbitration agreements. In the case of *Meacham v. Jamestown Franklin & Clearfield*,[235] the majority rejected enforcement of an arbitration agreement on grounds similar to the public policy exception.[236] However, Judge Cardozo, in a concurring opinion, introduced the remedial classification in the following words:

> An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum.[237]

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231. Note, *Incorporation of State Law Under the Federal Arbitration Act*, 78 MICH. L. REV. 139, 140 (1980) [hereinafter Note].
232. 41 U.S. (16 Pet.) 1 (1842).
233. *See* Kochery, *supra* note 226, at 90.
234. *Id.* at 75.
235. 211 N.Y. 346, 105 N.E. 653 (1914).
236. *Id.* at 351-52.
237. *Id.* at 352.

Several years later, Judge Cordozo again, and this time writing for a unanimous court, reaffirmed his remedial classification of arbitration agreements as follows:

> The common law limitation upon the enforcement of promises to arbitrate is part of the law of remedies. . . . The rule to be applied is the rule of the forum. Both in this court and elsewhere the law is so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It indicated by a new method the obligation then existing.[238]

The view that arbitration agreements were procedural and not substantive had support not only in state courts but also in federal courts before and after the enactment of the FAA.[239] The procedural classification also had support in the legislative history and intellectual commentary following the Act.[240] The procedural interpretation was later reinforced by the decision of the United States Supreme Court in *Erie R.R. v. Tompkins*,[241] which overruled *Swift v. Tyson*.[242] In *Erie*, the Court stated that there is no general federal common law. It denied Congress the power to announce any substantive common law rules applicable to the states in the following words:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . .[243]

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238. Matter of Berkowitz v. Arbib & Houldberg, 230 N.Y. 261, 270, 130 N.E. 288 (1921).

239. *See* Committe on Commerce, *supra* note 227, at 155. The first U.S. Supreme Court decision characterizing arbitration agreements as procedural came in the case of Heckers v. Fowler, 69 U.S. (2 Wall.) 123 (1864), then came Red Cross Line v. Atlantic Fruits Co., 264 U.S. 109 (1924). *See* Local 19 Warehouse Union v. Buckeye Cotton Oil Co., 236 F.2d 776 (6th Cir. 1956), holding the FAA to be procedural. In view of the vagueness in the statute, there was understandably general confusion among the courts and scholars on this question. *See* Lorenzen, *Commercial Arbitration*, *supra* note 224, at 751-57. *See also* Cook, *Substance and Procedure in Conflict of Laws*, 42 YALE L.J. 333 (1933) [hereinafter Cook]; Kochery, *supra* note 226, at 85; California Prune & Apricot Growers Ass'n v. Catz American Co., 60 F.2d 788 (9th Cir. 1932).

240. Committee on Commerce, *supra* note 227.

241. 304 U.S. 64 (1938).

242. 41 U.S. (17 Pet.) 1 (1842).

243. *Erie*, 304 U.S. at 78-79.

According to this statement and what is generally called the *Erie Doctrine*, state law would govern federal courts sitting in diversity unless the matter is controlled by the United States Constitution or a federal statute. However, the decision in *Erie* did not resolve the interpretational problems presented by the FAA. It merely raised the question whether the FAA could be interpreted in a manner consistent with the United States Constitution to give federal courts the power to announce federal common law in arbitration cases.[244] If Congress intended by the Act to announce substantive common law rules, the statute would be unconstitutional on that account based on *Erie*. However, under *Erie*, Congress, by passing the FAA, could have empowered federal courts to develop a body of substantive federal common law rules if the subject matter was one over which Congress had the power to legislate. According to Field, the power of federal courts to develop common law must be found in some enabling federal statute such as the FAA or the United States Constitution.[245]

Two related issues were thus raised by the *Erie* decision. First, did Congress empower the federal courts through the FAA to create a body of federal common law governing arbitration agreements? Second, did section 2 create substantive rather than procedural rights? If arbitration agreements were interpreted as only procedural, it would have significant implications on the right to revoke arbitration agreement under section 2. The public policy exception and other defenses would be a matter of state law. If, on the other hand, the FAA were interpreted as creating substantive rights, the public policy defense under state law would not necessarily be unavailable. The availability of a state law public policy defense would depend on whether Congress intended to preempt the entire field.

*b. Early Post-*Erie *Cases*

The first post-*Erie* opportunity for the U.S. Supreme Court to wrestle with the interpretation of the FAA was in *Bernhardt v. Polygraphic Co.*[246] *Bernhardt* was a diversity suit involving an em-

244. The power of Congress to mandate the creation of federal common law in cases where Congress has the power to legislate is not in question. For example, the U.S. antitrust statute is so vague and imprecise that the courts have had to develop a body of substantive federal common law rules governing the area. For a discussion of the point raised here, *see* Merrill, *supra* note 230, at 30-36.

245. Field argued that the power of federal courts to make federal common law is not based on diversity but on the enabling statute. Whether federal common law can be made depends on interpreting the enabling statute. *See* Field, *supra* note 230, at 928.

246. 350 U.S. 198 (1956).

ployment contract which contained an arbitration agreement An application was made under section 3 of the FAA to stay litigation pending arbitration under the contract. The question presented was whether section 3 was purely procedural and, therefore, empowered federal courts to stay litigation without violating the *Erie Doctrine.* Conscious of the constitutional issues raised by *Erie*, the Court sidestepped the interpretational problems by adopting a narrow definition of section 3. It held that section 3 would only apply if the transaction involved was covered by sections 1 and 2 of the FAA.[247] However, by further holding that the employment contract involved was neither a maritime nor a commercial transaction under section 2, the FAA did not apply.[248] Thus, the Court did not have to determine whether section 2 was procedural or substantive. Furthermore, the Court pointed out that under the *Erie Doctrine*, Congress could not make arbitration agreements enforceable contrary to state law in diversity cases. Though the FAA did not apply to the dispute at hand, the Court examined the enforceability of arbitration agreements to such cases in diversity disputes. It concluded that such arbitration agreements created substantive and not procedural rights under state law. In its own words, the Court said:

> We deal here with a right to recover that owes its existence to one of the states, not to the United States. The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts.[249]

The importance of this interpretation of arbitration agreements outside the scope of the FAA may be overshadowed by the attempt of the Court to avoid the constitutional questions raised. A holding by the U.S. Supreme Court that an arbitration agreement created substantive rights under state law was a significant step toward resolving the substance and procedure debate. Such a decision tended to undermine the validity or continuing viability of previous cases holding to the contrary. This includes the Court's own precedent[250] and the "famous" Cardozo remedial classification in *Meacham*[251] and *Bertkowitz.*[252] It has, indeed, been demonstrated that Cardozo's

247. *Id.* at 202.
248. *Id.* at 200.
249. *Id.* at 202-03.
250. *See* Red Cross Line v. Atlantic Fruits Co., 264 U.S. 109 (1924); and *supra* note 239.
251. Meacham v. Jamestown Franklin & Clearfield, 211 N.Y. 346, 105 N.E. 653 (1914).
252. Matter of Berkowitz v. Arbib & Houlberg, 230 N.Y. 261, 270, 130 N.E. 288 (1921).

remedial classification was on a weak analytical basis.[253] Whether or not arbitration agreements were remedial, procedural, or substantive was not subject to a single and definite answer. Arbitration agreements may be procedural or substantive depending on the purpose for which the classification is made.[254] As a method of dispute resolution, an arbitration agreement may be procedural. If the question is whether a party to an arbitration agreement is entitled to enforce the right to arbitrate, it relates to a substantive contractual right and its corresponding obligation.

The apparent blanket characterization by Judge Cardozo in *Meacham* ignored the rights and duties incident to the contract to arbitrate. Moreover, Cardozo's remedial characterization, it has been argued, was not based on any authority.[255] He cited none to support that position because there was none. Besides, the validity of the statement that arbitration agreements were only remedial has been challenged by several commentators.[256] First, in cases where the arbitration agreement was revocable at any time prior to an award, it created a substantive right. A breach of that right entitled an aggrieved party to nominal damages. The unusual character of the damages related to the quantum of the remedy which could not, however, determine the substantive nature of the rights under the arbitration agreement. In other words, the right which gave rise to the nominal damages remains substantive irrespective of the size of the legal remedy. Second, in states where arbitration agreements were unenforceable, the right created by the agreement remained valid and substantive even though those states denied access to the courts for enforcement.[257] A finding by the U.S. Supreme Court that arbitration

253. Kochery developed a persuasive analysis of the cases before and after *Meacham* and *Berkowitz* in which he exposed the weakness in Cardozo's holding in both cases. *See* Kochery, *supra* note 226, at 81.

254. *Id.* at 85; *see also* Cook, *supra* note 239; Lorenzen, *Commercial Arbitration, supra* note 224, at 751-54.

255. Kochery, *supra* note 226, at 81.

256. *See supra* notes 253-55.

257. In its commentary on the statute in 1925, the Committee on Commerce, Trade and Commercial Law took pains to argue that there was a misconception about the legal effects on arbitration agreements. In its view, arbitration agreements existed as a matter of law but were merely unenforceable. This is what the Committee had to say:

> The courts have always recognized that such agreements have existed but have refused to enforce them. *It was often said loosely that arbitration agreements were void, even under the common-law rule. This statement was not accurate. While the courts refused to enforce arbitration agreements specifically, they recognized their existence because they gave another remedy.* From the earliest times it was held that for a breach of arbitration agreement the aggrieved party was entitled to damages.

Committee on Commerce, *supra* note 227, at 155.

agreements outside the scope of the FAA were substantive set the stage for future decisions. Furthermore, this holding tended to erode the application of the law of the forum and its public policy defense. It, however, did not resolve the issue of congressional intent.

Without definite guidance from the U.S. Supreme Court on the choice of law question, federal courts were divided on the subject. Some courts held that the FAA created a substantive federal law preempting contradictory state law.[258] The leading decision on this point was rendered by the Second Circuit Court of Appeals in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*[259] *Robert Lawrence* was a diversity suit in which the issue was whether an allegation of fraud in a commercial transaction containing an arbitration agreement was to be determined by federal or state law. Finding that the arbitration agreement was covered by the FAA, the Court held that "Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements."[260] The Court went even further in stating that Congress intended the FAA to be as widely effective as possible.[261] Thus, the FAA constituted a statement of national law of equal force in both state and federal courts. The logical implication of the pro-federal stance of *Robert Lawrence* would be the preemption of the state law public policy defense.[262]

On the other hand, other courts interpreted section 2 to allow reference to state law, but even then they differed in their reasons for looking to state law.[263] For instance, in *Lummus Co. v. Common-*

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258. *See, e.g.*, Kentucky River Mills v. Jackson, 206 F.2d 111 (6th Cir. 1953), *cert. denied*, 346 U.S. 887; Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995 (8th Cir. 1972); Georgia Power Co. v. Cimarron Coal Corp., 526 F.2d 101 (6th Cir. 1975), *cert. denied*, 425 U.S. 952 (1976); Lell v. Jacoby-Gender Inc., 542 F.2d 34 (7th Cir. 1976); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk Gmbt, 585 F.2d 39 (3d Cir. 1978); Hart v Orion Ins. Co., 453 F.2d 1358 (10th Cir. 1971); *In re* Ferrara S.P.A., 441 F. Supp. 778 (S.D.N.Y 1977).

259. 271 F.2d 402 (2d Cir. 1959), *cert. denied*, 364 U.S. 801 (1960).

260. *Id.* at 406.

261. *Id.* The Court said: "It is clear that the Congress intended to exercise as much of its Constitutional power as it could in order to make the new arbitration Act as widely effective as possible." *Id.*

262. A thoughful student note, while applauding the decision in *Robert Lawrence*, argued that the Court went too far in announcing what was in essence the creation of federal common law. *See* Note, *Erie, Bernhardt and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies and A Right to Remedy*, 69 YALE L.J. 847, 859 (1960) [hereinafter Note, *Erie, Bernhardt and Section 2*]. *See also* Recent Development, *United States Arbitration Act Held to Create Federal Substantive Law Applicable in Both State and Federal Courts*, 60 COLUM. L. REV. 227 (1960).

263. *See* Southeastern Enameling Corp. v. General Bronze Corp., 434 F.2d 330 (5th Cir. 1970); Litton Res., Inc. v. Pennsylvania Turnpike Comm'n, 511 F.2d 1394 (3d Cir. 1975); American Airlines, Inc. v. Louisville & Jefferson County Air Bd., 269 F.2d 811, 815-17 (6th Cir. 1959).

wealth Oil Ref. Co.,[264] the First Circuit Court of Appeals disagreed with the opinion in *Robert Lawrence*, holding that state law governed the same issues raised in *Robert Lawrence*.[265] It became obvious that the Supreme Court would have to resolve this disagreement among the Circuit Courts. The Court got that opportunity in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*[266] In *Prima Paint*, the issue was whether allegations of fraud in a consulting contract containing an arbitration agreement was a question for the courts or arbitrators to decide. The Second Circuit Court of Appeals affirmed the District Court's opinion that the question of fraud in the container contract was to be determined only by the arbitrators. In so holding, it relied on the *Robert Lawrence* national law characterization of the FAA.[267]

The U.S. Supreme Court found that the consulting agreement fell within the scope of the FAA, and agreed with the lower courts that the arbitration agreement was severable from its container commercial or maritime contract. Any attack on the arbitration agreement, the Court said, must only be directed at the arbitration clause itself and not the container contract.[268] Since the allegations of fraud in *Prima Paint* related to the container clause and were not specifically directed at the arbitration clause, the Court concluded that the question of fraud had to be decided by arbitration. The Court was unwilling, however, to endorse or support the expansive Second Circuit interpretation of the FAA in *Robert Lawrence*.[269] It is important to note that the Court did not consider the issue of severability of the arbitration clause from its container contract as preemptive substantive federal law. It held that the question of severability was specifically addressed by Congress in section 4 of the FAA, which authorizes a court to compel arbitration "once it is satisfied that the making of the agreement for the arbitration or the failure to comply with the arbitration agreement is not at issue."[270]

Thus, the power of a federal court to order arbitration was not based on the creation of a substantive federal law, but on the duty of federal courts to apply federal statutes if they are constitutional.

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264. 280 F.2d 915 (1st Cir. 1960).
265. *Id.* at 924.
266. 388 U.S. 395 (1967).
267. 360 F.2d 315 (2d Cir. 1976).
268. *Prima Paint*, 388 U.S. at 403-04.
269. For a discussion, *see* Hirshman, *supra* note 229, at 1329-34.
270. *Prima Paint*, 388 U.S. at 403.

The question then was whether Congress could constitutionally prescribe how federal courts may conduct themselves on a subject that Congress had the power to legislate. Answering that question affirmatively, the Court noted that "it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty."[271] The Court concluded that federal courts are bound to apply the provisions of federal statutes such as the FAA. However, complying with specific congressional instructions in the statute does not necessarily suggest that the statute created substantive federal law.

It is significant to note that the *Prima Paint* Court rejected the aggressive and expansive interpretation of the FAA by the Second Circuit. To have endorsed that approach would have cast serious doubts over the availability of public policy and other normal defenses to contract under state law. It was careful enough to leave open the option of state law defenses. Besides, the Court was conscious of the goals of Congress in enacting the FAA.[272] One such goal was to accord equality of treatment between arbitration agreements and other contracts. As a general rule, other contracts are not immunized from judicial review. It is hardly surprising that Congress provided for judicial intervention or challenge to arbitration agreements similar to what is available to any contract. One of the basic defenses to any contract is the public policy exception, which is generally a matter of state common law. After *Prima Paint*, any public policy defense to the enforcement of an arbitration agreement, whether under state or federal law, must be directed specifically at the arbitration clause, not at its container contract.

As a practical matter, the holding in *Prima Paint* will have a dampening effect on the use of the public policy and other defenses to the enforcement of arbitration agreements. Arbitration agreements are often part of a standard form contract in which the parties would seldom have the opportunity for separate negotiations on the arbitration clause. Even in the case of non-standard form contracts, the arbitration clause might not be the subject of a separate bargain. Requiring the grounds for the revocation of arbitration agreements to be specifically directed at the manner in which the clause was included seriously limits the opportunity for the public policy defense.

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271. *Id.*, at 405.
272. *Id.* at 403-04.

For while the public policy exception may be applicable to the container contract, the dispute would still be submitted to arbitration because it does not necessarily affect the arbitration clause itself.

The issue of arbitration clause enforcement was addressed in a recent California Court of Appeals decision in *Lewis v. Prudential Bache Securities*.[273] The plaintiff in *Lewis* alleged that Prudential fraudulently calculated interest charges in its dealing with the plaintiff and other customers. Prudential's standard customer agreement contained an arbitration clause. It was contended that given the fraud, the contract of adhesion, and the fact that California public policy disfavored the interest charges in question, the arbitration clause should not be enforced. The Court of Appeals rejected this contention. It recognized the problem that there might have been an exercise of monopolistic overreaching in the container contract, but that was not sufficient to override the FAA provisions as interpreted by *Prima Paint*, and other U.S. Supreme Court decisions.[274] Furthermore, the court recognized the defenses of fraud and unconscionability, but concluded that they had to be directed at the arbitration clause itself.[275] Finally, in response to the public policy defense, the court argued that the fact that the substantive claims of the plaintiff may have serious public policy implications is not a sufficient basis for the use of the public policy exception under the *Prima Paint* rationale.[276]

The *Lewis* case is consistent with relevant U.S. Supreme Court decisions. However, it raises important questions which may become relevant in different factual settings. Can the fraudulent inducement of the entire contract ever negate an arbitration clause? Or could the exercise of excessive bargaining power ever constitute a defense to an agreement to arbitrate, if only indirectly?[277] From the language

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273. 179 Cal. App. 3d 935, 225 Cal. Rptr. 69 (1986).
274. *Id.* at 942.
275. *Id.* at 943-44.
276. *Id.*
277. Yelpaala, *Choice of Law, supra* note 225, at 232. One implication of *Prima Paint* is that issues relating to the formation of arbitration agreements may indeed be controlled by state law. Contract formation is a matter of state law. A challenge to the formation and validity of the arbitration agreement should then be a matter of state law. A number of cases have supported this conclusion. *See* Perry v. Thomas, 482 U.S. 483 (1987), where in footnote 9 the court said that the formation of arbitration contracts can be wholly a matter of state law if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts. *Id.* at n.9. *See also* Supak & Sons Mfg., 593 F.2d 135 (4th Cir. 1979); Duplan Corp. (Dupan Yarn Division) v. W.B. Davis Hosiery Mills, Inc., 442 F. Supp. 86 (S.D.N.Y. 1977); Ross v. Twentieth Century-Fox Film Corp., 236 F.2d 632, 634 (9th Cir. 1956); Securities Indus. Ass'n v. Connolly, 703 F. Supp. 146 (D. Mass. 1988).

of the decided cases, it should be possible to reach the arbitration agreement through the container contract if the claim is properly pleaded, *i.e.*, if the defense is directed not only at the container contract, but also at the arbitration clause.

The refusal by the U.S. Supreme Court to endorse the Second Circuit interpretation, however, left the debate over the substance and procedure and the choice between federal and state law unresolved. It was still unclear whether a party resisting an arbitration agreement on public policy grounds had to rely on state or federal law. The *Prima Paint* Court suggested that the answer to challenges to arbitration could be found in the statute itself through construction and interpretation. If the answer to the questions presented could be found through this method, there would be no choice of law problem. However, in complex situations where the issues can not be easily resolved through mere statutory construction, the choice of law problem might emerge.[278] It was then still unclear from the *Prima Paint* opinion what law would govern the public policy defense to arbitration. Notwithstanding the apparent limitations suggested by *Prima Paint*, federal courts started to apply federal law to state law challenges to arbitrability in an expansive manner.[279] In a few decisions it was intimated that state law defenses should be rejected only if they manifested some discrimination against arbitration, thus contravening the pro-arbitration national policy announced by Congress in the FAA.[280]

c. *The New Arbitration Trilogy*

From these decisions, it again became obvious that the U.S. Supreme Court would have to deal with the choice of law question. In three of its most recent landmark decisions described as the new arbitration trilogy,[281] the U.S. Supreme Court re-examined section 2 and established new controlling precedents for arbitration agreements under the FAA. Even though these cases were essentially domestic

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278. Hirshman, *supra* note 229, at 1327.

279. For a review of cases applying federal law, *see* Annotation, *Conflict of Laws as to Validity and Effect of Arbitration Provisions in Contracts for Purchase or Sale of Goods, Products, or Services*, 95 A.L.R. 3d 1145, 1150 (1979 & Supp. 1989) [hereinafter Annotation].

280. *See, e.g.*, Wydel Associates v. Thermasol Ltd. 452 F. Supp. 739 (W. D. Texas 1978); Duplan Corp. (Duplan Yarn Division) v. W. B. Davis Hosiery Mills, Inc., 442 F. Supp. 86 (S.D.N.Y. 1977). *See* Note, *supra* note 231, at 1400.

281. Professor Hirshman compares the impact of three recent U.S. Supreme Court decisions to the way in which arbitration in the labor area was unified under controlling federal law. *See* Hirshman, *supra* note 229, at 1306-07. *See also* Carbonneau, *supra* note 165, at 197.

or local with no conflict of laws questions, they nevertheless constitute controlling precedents in interstate and international arbitration questions. The basic tenet of these cases is the establishment of a federal policy on arbitration. In fact, the policy announced by the Court was facilitated by an improved judicial attitude towards forum selection clauses,[282] the growing acceptance of arbitration, the increasing case load in the Courts,[283] and the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[284] the first of the trilogy, the Supreme Court explained that at the core of congressional intent in passing the FAA was the establishment of a liberal federal policy on arbitration. Such a policy was to guarantee the expeditious enforcement of private contractual arrangements to arbitrate disputes.[285] It was to ensure party autonomy and freedom of contract. The *Moses* Court went a step further and stated in clear terms that section 2 simply created a body of federal substantive law covering the establishment and the regulation of the duty to honor arbitration agreements.[286] In other words, whether there exists a duty to arbitrate, and if so, how that duty may be regulated is a question of federal substantive law. The Court did not stop there. It took yet another step towards resolving the federal/state choice of law debate. It extended the scope of its newly declared federal substantive law under the FAA to defenses to arbitration in the following terms:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[287]

The *Moses* Court, by these statements, established a strong pro-federal policy favoring arbitration similar to that announced by the Second Circuit Court of Appeals in *Robert Lawrence*.[288] The depth

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282. Reese, *The Supreme Court Supports Enforcement of Forum Clauses*, 7 INT'L LAW. 530 (1973); Gruson, *supra* note 180, at 133.

283. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1971), where the Court complained about the increasing caseload.

284. 460 U.S. 1, 24 (1983).

285. *Id.* at 22.

286. *Id.* at 24.

287. *Id.* at 24-25.

288. 271 F.2d 402 (2d Cir. 1959), *cert. denied*, 364 U.S. 801 (1960).

and intensity of the federal arbitration policy as announced by the Court was reinforced in *Dean Witter Reynolds, Inc. v. Byrd*,[289] the third of the trilogy. In *Bryd*, the Supreme Court noted that the FAA required the courts to vigorously enforce arbitration agreements since the preeminent concern of Congress was the enforcement of private agreements.[290] It was argued that the overriding purpose of the Act was to promote expeditious and efficient resolution of disputes. The Court rejected this argument by relying on the House Report which stated that Congress intended to "place an arbitration agreement upon the same footing as other contracts, where it belongs."[291] This objective of Congress is but an extension of the primary purpose of Congress to enforce private agreements.

The second case in the trilogy, *Southland Corporation v. Keating*[292] is a California case which, for that reason, deserves greater coverage. *Keating* involved a class action suit concerning a franchise agreement between Southland, the franchisor and owner of 7-Eleven Convenience stores, and Keating, franchisee and representative of other franchisees. The question raised in *Keating* was whether an arbitration agreement found in all Southland's contracts should be enforced. The suit involved several claims including breach of contract, fraud, misrepresentation, and violation of the disclosure requirement of the California Franchise Investment Law.[293] Southland obtained a motion from the Superior Court compelling arbitration of claims except those under the Franchise Investment Law.[294] The Court of Appeals reversed the trial court decision holding that section 2 of the FAA compelled the arbitration of all claims and the Franchise Investment Law was invalid under the Supremacy Clause of the United States Constitution to the extent that it required otherwise.[295] Reversing the Court of Appeals, the California Supreme Court held that the claims under the Franchise Investment Law were not arbitrable.[296]

The decision of the California Supreme Court was influenced by its search for the legislative intent behind the Franchise Investment Law and by its own precedent on statutory interpretation. The Franchise Investment Law contained a non-waiver provision similar

289. 470 U.S. 213 (1985).
290. *Id* at 219.
291. *Id.*
292. 464 U.S. 559 (1984).
293. CAL. CORP. CODE § 31512 (West 1977).
294. Keating v. Superior Court, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982).
295. Keating v. Superior Court, 109 Cal. App. 3d 784, 167 Cal. Rptr. 481 (1980).
296. *Keating*, 31 Cal. 3d at 598.

to that found in the Federal Securities Act of 1933.[297] According to the court, the California legislature purposefully and deliberately adopted parallel non-waiver provisions based on the interpretation of these provisions in the Securities Act of 1933 by the U.S. Supreme Court in *Wilko*.[298] The obvious intention of the California legislature was to have the non-waiver provisions of the Franchise Investment Law controlled by *Wilko*, thereby making the Franchise Investment Law claims non-arbitrable. In reaching this conclusion on the legislative intent, the court relied on its own precedent on statutory interpretation stating as follows:

> This court has long recognized the principle of statutory construction that "[w]hen legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after the federal statutes.[299]

While acknowledging that the FAA contains applicable substantive federal law, the court questioned whether it preempted the ability of California to adopt statutory regulations including non-waivable judicial remedies. It concluded that the FAA preempted the field when federal jurisdiction exists, but not the case at hand.[300]

Upon review, the U.S. Supreme Court rejected the opinion of the California Supreme Court, stating that the latter's interpretation of the Franchise Investment Law provisions was in direct conflict with section 2 of the FAA.[301] Virtually endorsing the position of the California Court of Appeals, the U.S. Supreme Court asserted that Congress has plenary powers under the Commerce Clause of the United States Constitution to prescribe rules governing interstate or international commerce.[302] In exercise of these powers, Congress enacted section 2, by which it preempted states' power to determine questions of arbitrability or strictly judicial resolution of certain claims subject to an arbitration agreement. Reaffirming its earlier decision in *Prima Paint*,[303] and *Moses*, the Court held that issues of arbitrability are questions of federal substantive law equally appli-

297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.* at 604.
301. Southland Corp. v. Keating, 465 U.S. 1, 15 (1984).
302. *Id.* at 11-12.
303. 338 U.S. 395 (1967).

catable to federal and state courts.[304] Thus, it concluded that section 31512 of the California Franchise Investment Law was in violation of the supremacy clause of the United States Constitution.[305]

The opinion of the U.S. Supreme Court in *Keating* may suggest that the Court was laying the last brick in the edifice of an evolving federal law of commercial and maritime arbitration. The decision seems to have resolved the substance-procedure debate and the pre-emption questions that plagued the interpretation of the FAA for decades. However, the pro-federal and expansive interpretations of the FAA by the lower courts explicitly rejected in *Prima Paint*,[306] but expressly endorsed in *Moses*,[307] ran into opposition in *Keating*. Justice O'Connor, in a dissenting opinion joined by Justice Rehnquist, challenged the majority interpretation of section 2 as creating substantive federal law.[308] The dissent argued that the FAA was intended to be a procedural statute applicable to only federal courts. Second, Justice Stevens, in a concurring opinion, agreed that section 2 created preemptive federal substantive law, but rejected the pre-emption of state law defenses under the saving clause of section 2.[309]

As noted earlier, the ambiguity in the legislative history of the Act is such that the procedural characterization of the dissent could easily be supported.[310] However, the fact that there is support for a procedural characterization of the Act does not preclude the intent to create substantive rights. Whether or not Congress intended by section 2 the creation of substantive federal law as to the validity and enforcement of arbitration agreements requires a return to the prevailing conditions of the time. It may be recalled that prior to the Act arbitration agreements were either *invalid*, *unenforceable*, or *revocable* in most states.[311] A federal statute which states that a

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304. *Keating*, 465 U.S. at 12.
305. *Id.* at 16.
306. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
307. Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983).
308. *Keating*, 465 U.S. at 31.
309. *Id.* at 18.
310. *See* Committee on Commerce, *supra* note 227, where the purpose of the statute was stated as follows:

> That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts. . . . The rule is succinctly stated in the Meacham case, "An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum."

Id.
311. *See* Note *Erie, Bernhardt and Section 2*, *supra* note 262, at 854-56; Kochery, *supra* note 226, at 84; Lorenzen, *Commercial Arbitration*, *supra* note 224, at 754.

written contract to settle commercial or maritime disputes by arbitration "shall be *valid, irrevocable,* and *enforceable,*" from its plain and contextual meaning, creates a substantive right. What was previously invalid, unenforceable, or revocable under state law is now valid, enforceable, and irrevocable under federal law.[312] Thus, a new right is created in each situation notwithstanding the fact that a substantive right might have existed in the case of unenforceable and revocable arbitration agreements. The substantive rights that existed under state common law discussed earlier is different from the new substantive right under federal law. The process by which these rights may be enforced is undeniably procedural. The right to invoke the process is, however, substantive, a point that seems to have escaped Judge Cardozo in *Meacham* and *Bertkowitz.* There is significant intellectual commentary supporting the creation of new and federal substantive rights.[313] The majority position on this point is a logical extension of the Court's earlier holding in *Bernhardt* that other arbitration agreements not covered by the FAA created substantive rights under state law.

However, the euphoria of the pro-arbitration and pro-federal attitude of the lower courts seems to have swept through the Supreme Court. The holding in *Prima Paint* was much narrower than its subsequent interpretation and use by the Court in *Moses* and *Keating.* That the FAA created federal substantive law is consistent with congressional intent to stop the hostility against arbitration agreements. Section 2, therefore, preempted any contradictory state common law rules or statutes. It is apparent from the legislative history and intellectual commentary that Congress merely wanted to overrule state law which made arbitration agreements invalid, revocable, and unenforceable.[314] Congress also wanted to bring arbitration agreements within the same legal framework as other contracts. It did not intend to elevate arbitration agreements above the legal treatment accorded contracts in general. Thus, Justice Stevens argued that Congress did not intend to preempt state law defenses under the saving clause "such grounds as exist at law or equity for the revocation of any contract."[315] In view of the ambiguity in the legislative history and the lack of clear and manifest congressional intent to

312. *See supra* note 311.
313. *See supra* notes 224, 226, and 262.
314. *See* discussion and accompanying notes on legislative history, *supra* notes 219, 223, and 257.
315. Southland Corp. v. Keating, 465 U.S. 1, 18 (1984).

occupy the field completely, he argued that extending the preemption to the defenses to the enforcement of arbitration agreements would be inconsistent with the limited objectives of Congress in passing the Act.

In a footnote, the majority responded to Justice Stevens in carefully crafted language. They agreed that a party "may assert general contract law defenses such as fraud to avoid enforcement of an arbitration agreement."[316] They concluded, however, that:

> the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity for the revocation of any contract but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.[317]

In other words, the majority did not reject the notion of applicable non-discriminatory state law defenses. It found that the Franchise Investment Law was discriminatory against arbitration agreements and, therefore, contravened the stated national policy favoring arbitration. To the extent that Justice Stevens was concerned with the preservation of non-contradictory state law defenses in general, the majority opinion is consistent with that position. The majority position on this point is, therefore, rational, but quite limited in scope. Thus, it is submitted that the public policy and other defenses to arbitration should be permitted notwithstanding the suggestion to the contrary in *Moses*.

The *Moses* Court seemed affected by the winds of change blowing from under and did not exercise as much judicial restraint as the *Keating* Court. Besides, the federal policy favoring arbitration is not subverted in any way by allowing general contract law defenses under state law to govern. General defenses to contract such as fraud, duress, mistake, unconscionability, and public policy are well developed under state law. To the extent that any state law defenses including public policy discriminates against arbitration agreements, they would be inconsistent with the FAA and, therefore, invalid. Moreover, arbitration agreements are not so different a category of contracts as to warrant a special and different treatment. The public policy defense and other challenges to the enforcement of other contracts are not governed by federal substantive law. Giving arbitration agreements a special treatment would be clearly inconsistent

316. *Id.* at 16.
317. *Id.*

with the primary objective behind the Act. Finally, it could be argued that denying states the right to use non-contradictory state law defenses would serve the purpose of developing a comprehensive national policy of arbitration similar to what pertains to the labor statutes.[318] But the national policy of arbitration is hardly as pervasive, nor are the consequences of commercial disputes similar to those of labor strife, strikes, and industrial upheavals. Total and complete occupation of the field by federal law would be unwarranted under the present circumstances and the legislative history of the Act.

The wave of pro-arbitration mood in the United States may, however, lead to a reaffirmation of the preemptive reasoning in *Moses* and *Keating*. The language of these cases provides some basis for a subsequent reassertion of the preemption argument. The logic of the majority opinion in *Keating* and *Moses* left little room for a non-preemptive argument. By holding, (1) that the California law was violative of the Supremacy Clause of the United States Constitution, (2) that Congress intended to preempt questions relating to the duty, the regulation, and enforcement of arbitration agreements, and (3) that a contrary interpretation of section 2 would undermine congressional intent, the majority, by the force of its own logic, had to find that section 2 preempted California law defenses under *law* or *equity*.

If section 2 preempts questions of permissible defenses against the enforcement of arbitration agreements, state courts will then have to rely on substantive federal law in the application of section 2. There is a growing body of federal substantive law of defenses to the enforcement of forum selection clauses. The first modern case in which the defenses were explicitly developed by the U.S. Supreme Court was *Bremen*.[319] The Court identified three categories of defenses to forum selection clauses. The first category dealt with usual defenses to contracts such as fraud, undue influence, and overweening bargaining power.[320] The second covered a species of forum non-conveniens defense. That is, a permissible defense exists if the

318. The perceived importance of calm in the shops led to the establishment of the law of the shop under what is generally called the "Steelworkers Trilogy" interpreting section 301 of the Taft-Hartley Act. *See* United Steel Workers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steel Workers of America v. Warriers & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steel Workers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

319. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1971).

320. *Id.* at 12.

enforcement of the forum selection clause could so burden the resisting party as to deprive him of his day in court.[321] The third category addressed the public policy exception. Relying on its 1949 opinion in *Boyd v. Grand Trunk W.R. Co.*,[322] the Court held that "a contractual choice of forum provision should be held unenforceable if enforcement would contravene a strong public policy of the forum."[323]

3. *Party Autonomy*

One important question raised by the FAA is whether the parties to an arbitration agreement covered by the Act can freely choose state law to govern their rights and obligations. It has been argued above that a liberal reading of recent U.S. Supreme Court decisions may sugggest that, where the FAA is applicable, party autonomy is eliminated through the preemption argument. Such a reading of recent Supreme Court decisions would be too expansive a view of the Court's interpretation of the FAA. The Court has noted quite appropriately on several occasions that the purpose of the FAA was to put arbitration agreements on the same footing as other contracts.[324] Party autonomy in general contract law is recognized by the Second Restatement of the Conflict of Laws.[325] Section 187 states that the law of the state chosen by the parties will be applied unless, *inter alia*, its application would contravene some fundamental policy of another state.[326] Thus, the Second Restatement, while recognizing party autonomy, also accepts the public policy exception. An increas-

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321. *Id.* at 19.
322. 338 U.S. 263 (1949).
323. *Bremen*, 407 U.S. at 15.
324. The equality of treatment has been stressed by the Court in virtually every case where there is an opportunity to do so. *See* discussion of the new trilogy *supra* notes 284-91 and accompanying text.
325. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS 561 (1969).
326. *Id.* Section 187(2) provides as follows:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id. at § 187.

ing number of states are adopting the Second Restatement.[327] The question then is whether party autonomy and its public policy limitations would be available to arbitration agreements covered by the FAA.

The possible existence of the public policy exception in party autonomy in arbitration cases is complicated by the strictures of the *Prima Paint* rationale. It may be recalled that the *Prima Paint* Court established the principle that any attack on an arbitration agreement must be directed at the manner in which the arbitration agreement was obtained, but not the general contract containing that agreement.[328] Thus, if a choice of state law is possible under the FAA, it may be defeated on public policy grounds if the method by which the arbitration clause was obtained contravened some fundamental public policy of the forum.[329] The first question, however, is whether the parties to an arbitration agreement under the FAA are at liberty to choose state law over the FAA to govern their rights and duties.

There is some disagreement among the courts over the extent to which party autonomy exists under the FAA. Some courts have held that implicit in the *Prima Paint* decision was a prohibition of the choice of state law in areas governed by the FAA. According to one Circuit Court of Appeals, "[t]o permit the parties to contract away the application of the Act by adopting state law to govern their agreement would be inconsistent with the Act itself and with the holding in *Prima Paint.*"[330] However, it has been argued that the FAA should only preempt contrary state law chosen by the parties.[331] State law is, therefore, preempted if it contradicts the FAA or undermines its policy objectives. This interpretation of the statute is consistent with its legislative intent and the non-preemptive arguments advanced so far.

The question whether the FAA preempts any choice of state law may well have been resolved by another recent U.S. Supreme Court decision in *Volt Information Sciences, Inc. v. Board of Trustees of*

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327. For a discussion of the approaches adopted by various states, *see* Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 582, 591-92 (1983). For a more recent update, *see* Symeonides, *Choice of Law in American Courts in 1988*, 37 AM. J. COMP. L. 457 (1989).

328. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

329. *See* Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

330. Commonwealth Edison Co. v. Gulf Oil Corps., 541 F.2d 1263, 1269 (7th Cir. 1976). *See also* Webb v. Rowland & Co., 800 F.2d 803, 807 (1986); Ainsworth v. Allstate Ins., 634 F. Supp. 52, 54 (W.D. Mo. 1985).

331. *See* Lorenzen, *supra* note 224, at 759. *See also* Annotation, *supra* note 279 at 1162.

the Leland Stanford Junior Univ..[332] In *Volt Information Sciences*, the parties to a construction contract agreed that they would arbitrate all disputes arising out of that contract under the laws of the state in which the contract was to be performed, which was California. When a dispute arose, the rights of two other companies not subject to the arbitration agreement were implicated. Volt petitioned the Superior Court to compel arbitration and stay prosecution of the case before the court. Stanford, in turn, responded with a motion to stay arbitration pursuant to the provisions of California Code of Civil Procedure section 1281.2(c). It argued that the pending lawsuit involved third parties not subject to the arbitration agreement. While the Code of Civil Procedure of California would permit a stay of arbitration, there is no similar provision in the FAA. The Superior Court denied the motion to compel arbitration. In a well reasoned opinion, the California Court of Appeals affirmed.[333] The U.S. Supreme Court affirmed the lower courts' decisions.

The California Court of Appeal had construed the choice of law clause as incorporating the California rules of arbitration into the arbitration agreement.[334] Volt argued that such an interpretation compelled it to "waive" its federally created and guaranteed rights. It contended further that the validity of the "waiver" was a matter of federal rather than state law. Writing for the majority, Chief Justice Rehnquist, who had joined in the dissent with Justice O'Connor in *Keating*, rejected the "waiver" argument as a misconception of what rights were actually created by the FAA.[335] He emphasized two primary objectives of the FAA: 1) to overrule the longstanding judicial hostility towards arbitration agreements, and 2) to place such agreements on equal footing with other contracts.[336] For there to be a right to arbitrate under section 4 of the Act, there must exist an agreement to arbitrate. Section 4 "confers the right to obtain an order directing that arbitration proceed in the manner provided for in the parties' agreement."[337] Thus, by incorporating the California arbitration rules into their contract, the parties had agreed not to arbitrate disputes covered those rules. The right to arbitrate under

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332. 109 S. Ct. 1248 (1989).
333. *See* Board of Trustees of the Leland Stanford Junior Univ. v. Volt Information Sciences, Inc., 240 Cal. Rptr. 558 (1987) (ordered not published by California Supreme Court).
334. *Id.* at 559-60.
335. *Volt Information Sciences*, 109 S. Ct. at 1253.
336. *Id.*
337. *Id.*

the terms of the agreement never existed. There could not, therefore, be a waiver of such a right.

Of even greater implication is the Court's response to Volt's second contention. Volt argued that the Court of Appeal's construction of the choice of law clause violated the settled federal rule that questions of arbitrability should be liberally interpreted to accommodate the pro-arbitration federal policy. The Court rejected the contention that the pro-arbitration policy announced in its earlier precedents was offended by the decision of the Court of Appeal.[338] For one, by choosing California arbitration rules, the parties were merely adopting one set of procedural rules manifestly designed to encourage resort to arbitration. The pro-arbitration federal policy does not favor arbitration under any particular set of procedural rules. The Court felt that California was even playing a positive leadership role in this area by providing a remedy in an area that the FAA was silent.[339] Of importance to the Court is the pro-arbitration character of the California arbitration procedures. If these procedures had been less hospitable to arbitration agreements, and therefore non-neutral, the choice of California law might well have been ineffective. Such a holding would not negate party autonomy, but would rather be an indictment of the chosen state law as being inconsistent with the federal policy favoring arbitration.

Next, the Court dealt with the question of preemption of the California arbitration rules by the FAA, given that the former stayed arbitration involving interstate commerce. It held that the parties, by their choice of law clause, can replace sections 3 and 4 of the FAA dealing with procedural rules with those of the state.[340] This holding must be read, however, in conjunction with the argument that the California procedures were "manifestly designed to encourage resort to the arbitration process."[341] In other words, the ability to replace federal with state procedural rules may critically depend on, at least, the neutrality and, at most, the pro-arbitration qualities of the state law procedures. Equally important is how the Court addressed the rest of the preemption argument. Relying on its 1956 decision in *Bernhardt*, it argued that there is no express provision in the FAA suggesting preemption, or that Congress intended to occupy the entire

338. *Id.*
339. *Id.* at 1254 n.5.
340. *Volt Information Sciences*, 109 S. Ct. at 1254 n.5.
341. *Id.*

field. Any preemption of state law must be found through actual conflict with the FAA. The *Volt Information Sciences* Court reinterpreted its precedents by narrowing the broad preemptive implications of *Moses* and *Keating*. It concluded that a general preemptive argument could not be inferred from these cases, although specific, *i.e.*, contradictory, state statutory provisions might be preempted. The question of preemption is an important one. It is best to quote the Court's exact language. It said:

> [I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, . . . we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.[342]

The *Volt Information Sciences* decision is clearly consistent with the intent of Congress to put arbitration agreements on the same footing as other contracts. It is also consistent with the Court's longstanding policy of enforcing the reasonable expectations of the parties as expressed in *Bremen*, *Scherk*, and *Soler*. The dissent argued that the traditional choice of law process does not address the interaction between federal and state law. Thus, when there is a conflict between federal and state law, federal law would govern notwithstanding any choice of law provision to the contrary. In view of this, a vast majority of lower courts have rejected party autonomy when federal law is implicated.[343]

While the argument is not without merit, its weight is significantly reduced when examined in light of the purpose of the Act. Congress

342. *Id.* at 1255-56.
343. *Id.* at 1261.

wanted to eradicate the hostility towards arbitration agreements and compel the enforcement of privately bargained agreements to arbitrate. Its first task was to eliminate all state statutes and common law rules against the enforcement of arbitration agreements. In putting arbitration clauses and other contracts on the same footing, it thereby created a federal right. Any state law that discriminates against the enforcement of arbitration clauses would be invalid and preempted to the extent of such inconsistency. A choice of contradictory state law by the parties would therefore be invalid and unenforceable.

So far as the substantive rights to arbitrate are concerned, there is no choice of law possibility if state law is inconsistent with the FAA. In the case of consistent state law, a choice of such law would not contradict the goals of the FAA, and, therefore, poses no significant problems. The problem, however, exists in two areas: 1) state procedural rules for the enforcement of arbitration awards, and 2) state law defenses to arbitration. With regard to the first, the *Volt Information Sciences* court, as noted above, allowed party autonomy. In the case of state law defenses to arbitration, party autonomy would be consistent with the goals of the FAA as long as the defenses are general contract law defenses. Indeed, one of the earlier commentators of the FAA argued that party autonomy in the choice of governing law should be allowed if the chosen law has a reasonable connection with the case and the enforcement of the agreement would not be contrary to the public policy of the forum.[344] This is the position adopted by the Second Restatement on party autonomy. Thus, to the extent that state law defenses are not preempted, party autonomy in the choice of law area would advance the goals of the FAA, as would the public policy defense.

4. *International Arbitration*

The availability of the public policy defense to international arbitration agreements is complicated by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[345] The Convention has been the subject of extensive commentary which will

344. *See* Lorenzen, *supra* note 224, at 759.
345. New York Convention, *supra* note 220.

not be repeated here.[346] We are only interested in the limited question of the use of the public policy defense under the Convention. Since the United States is a signatory to the Convention, the Convention has become part of federal law that is applicable to all states. It is, therefore, necessary to compare the FAA with the Convention on the issue of public policy.

As a start, the Convention arguably covers a wider range of arbitration agreements than the FAA. It may be recalled that section 2 covers only maritime and commercial transactions. Also, while the Convention is concerned primarily with post-arbitral enforcement questions, section 2 deals with pre-dispute questions. The Convention nevertheless deals with pre-award matters in Article II. It states that:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.[347]

Article II does not define the limits of the types of arbitration agreements, though some limitations may be found in Article I. According to Article I, the Convention applies to foreign or non-domestic arbitral awards. Thus, the Convention is much broader in its coverage than the FAA, which deals with interstate and maritime transactions. However, it is unclear from Article II (1) what defenses a party resisting the enforcement of an arbitration agreement may have.[348] The obligation on contracting states is to *recognize* arbitration agreements. The Convention does not seek to predetermine issues of validity of the agreement. The obligation to recognize an arbitration agreement becomes operative if a valid agreement exists. The validity of the agreement may hinge on the nature of the defenses to contract formation under some substantive body of law unspecified by the Convention. The drafters considered but rejected the notion of

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346. *See* Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283 (1959) [herienafter Contini]; Samelers, *Consolidated Commentaries on Court Decisions on the New York Convention, 1958*, 4 Y.B. COM. ARB. 231 (1979); Aksen, *Application of the New York Convention by the United States Courts*, 4 Y.B. COMM. ARB. 341 (1979); A. BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1981).

347. New York Convention, *supra* note 220.

348. For a commentary on the Convention, *see* Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1062 (1961) [hereinafter Quigley].

predetermining the validity of agreements covered by the Convention.[349] By implication, they intended to leave questions of validity for the contracting states. They also gave contracting states the right to determine what subject matter is arbitrable. It may be argued that the contracting states may rely on their notions of public policy to limit what is arbitrable. It is doubtful, however, whether the public policy defense would be available in an action to stay litigation pending arbitration. Article II (3) mandates that the courts of a contracting state refer the parties to arbitration in such situations unless they find that "the said agreement is null and void, inoperative, or incapable of being performed."[350]

Article II (3) does not tell us what law should govern the issues of validity; nor does it say explicitly whether its list of defenses is exhaustive. It may be presumed that the forum, when seized of a stay of litigation proceeding, would apply the law chosen by the parties, and failing that, the applicable law, based on its conflict of laws rules and policies. Under this Article, the applicable defenses such as nullity and others may include the public policy exception. However, the drafters were interested in eliminating any basis for eroding the goals of the Convention. Thus, the explicit exclusion of the public policy defense in Article II (3) might have limited the occasions when arbitration agreements would not be enforced. Indeed, the reason why Article II was included was to ensure that the contracting states did not undermine the enforcement of arbitral awards by not recognizing the agreement to arbitrate.[351] The question is whether one can read the Convention as denying the public policy defense to the enforcement of international arbitration agreements.

At least one federal district court has suggested that the public policy exception is not available to the enforcement of international arbitration agreements. In *Development Bank of the Philippines v. Chemtex Fibers Inc.*,[352] it was argued that Article V (2)(b) of the Convention, as embodied in the amendment to the FAA, authorized a court to hold certain RICO claims non-arbitrable on public policy grounds. The court pointed out that Article V (2)(b) refers to enforcement of arbitral awards, not arbitration agreements. The language of this Article clearly prohibits domestic authorities from

349. Contini, *supra* note 346, at 292-95.
350. For commentary of Article II, *see id.* at 295-96; Quigley, *supra* note 348, at 1062.
351. Quigley, *supra* note 348, at 1063.
352. 617 F. Supp. 55 (S.D.N.Y. 1965).

denying recourse to arbitration. According to the court, "it is clear that the Convention does not contemplate the expression of local public policy as a barrier to arbitrability of claims."[353] While the Convention might have contemplated liberal recourse to arbitration, it is highly debatable that the drafters would have dealt with *all* the defenses to arbitration agreements in such a cryptic manner in Article II (3). Moreover, the main objective of the Convention was the recognition and enforcement of arbitral awards, not the enforcement of arbitration agreements. This is a matter of contract law. It is unlikely that the drafters sought to predetermine questions of validity of all defenses to contract in scores of countries with different legal systems.

We have seen above that the U.S. Supreme Court has developed certain defenses to the enforcement of forum selection clauses in international transactions. To what extent would such defenses be applicable to international arbitration agreements? Since arbitration agreements are a species of forum selection clauses, would all the *Bremen* defenses, including public policy, be applicable to arbitration cases? The first post-*Bremen* arbitration case that the Court took was *Scherk v. Alberto-Culver Co.*[354] *Scherk* involved an international commercial arbitration dispute which raised the question whether an agreement to arbitrate any dispute in an international transaction should be enforced when the claims alleged violations of the Securities Exchange Act of 1934. Following the *Bremen* rationale, the Court held such claims arbitrable.[355] It did not seem to endorse, however, the full range of *Bremen* defenses. It recognized fraud and coercion as possible defenses, but was unwilling to include public policy as an exception to the enforcement of international arbitration agreements.[356] The court was concerned about the U.S. international obligations under the New York Convention and the provisions of the FAA. Both the Convention and the FAA share similar policy goals of enforcing arbitration agreements. The Court relied on its holding in *Prima Paint* limiting a challenge to only the arbitration clause. It found that the drafters and delegates to the Convention were motivated by the desire to eliminate parochial attitudes that would minimize the enforcement of arbitration agreements. It there-

353. *Id.* at 57.
354. 417 U.S. 506 (1974).
355. *Id.* at 519.
356. *Id.* The Court dealt with defenses to arbitration in note 14. *Id.* at n.14.

fore endorsed the narrow application of its *Prima Paint* precedent to international arbitration cases. The Court, however, did not refer to, nor did it comment on, the defense to enforcement under Article II (3).[357] It is unlikely that the *Scherk* Court would have interpreted Article II (3) any more expansively than it viewed Article II (1).

Consistent with its goals, the Convention recognizes several exceptions to the enforcement of arbitration awards, including the public policy exception and the non-arbitrability of certain subject matters.[358] As the primary focus of the Convention is not the enforcement of, and defenses to pre-dispute agreements to arbitrate, the *Scherk* Court did not have to be influenced by the Convention on the question of the public policy defense. It nevertheless explained in a footnote that the public policy exception may be available at the award enforcement stage.[359] It is unclear what the Court meant by this statement. Did the Court believe that the public policy defense was unavailable to the enforcement of *international* arbitration agreements or to *all* arbitration agreements? If, as we have argued above, the public policy defense is available under domestic arbitration agreements, why should it not be available in international arbitration agreements?[360] Because it did not specifically reject the public policy exception in pre-dispute enforcement cases, the Court, arguably, has preserved that option, and perhaps for only the most blatant abuses of public policy. Such an interpretation would not be inconsistent with the Court's current global orientation, and its ever increasing and maturing respect for international arbitral tribunals.

The apparent reluctance of the Court to accept the public policy defense was shown in another international commercial arbitration case, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[361] *Soler* posed the question of the arbitrability of antitrust claims under the Sherman Act. The plaintiff, *inter alia*, advanced policy arguments to resist the arbitration of these claims. Relying on *American Safety Equipment Corp. v. J.P. Maguire & Co.*,[362] he argued that the policy of private prosecution of antitrust claims produced deterrent effects which would be lost in arbitration. The Court reviewed the *American*

357. *Id.* at 519. The Court addressed the Convention for Enforcement of Foreign Arbitral Awards in note 15. *Id.* at n.15.

358. *Id.* at 520.

359. New York Convention, *supra* note 220. Article V of the Convention recognizes several defenses, including the public policy defense embodied in sub-paragraph 2(b) of Article V. *Id.* at art. V.

360. Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974).

361. 473 U.S. 614 (1985).

362. 391 F.2d 821 (2d Cir. 1968).

Safety doctrine extensively and rejected its application to international commercial arbitration agreements.[363] It reiterated the importance of the national policy favoring arbitration and the enforcement of arbitration agreements. It considered this policy so important that it would not prejudge how the arbitrators would resolve the governing law issue and use that as a reason for not enforcing the agreement.[364] As in *Scherk*, the Court recognized the public policy exception, but only at the award enforcement stage. National courts of the United States, it argued, would have an opportunity at the award enforcement stage to insure that their statutory provisions and underlining policies were complied with by the arbitrators. If the arbitral award was violative of some fundamental public policy of the forum, a tribunal of the forum could reject enforcement on public policy grounds.[365]

The *Soler* decision has been the subject of mixed reviews. It has been criticized on several grounds. One commentator described it as radical and unpredictable.[366] According to other critics, the Court failed to adequately protect the public interest in antitrust disputes. By making antitrust claims arbitrable but reviewable on public policy grounds only at the award enforcement stage, the Court does not necessarily, nor sufficiently, protect any national interest of the United States. In *Soler*, the plaintiff was an American and the defendant a Japanese corporation. The enforcement of any arbitral award granted in Japan against a Japanese defendant was more likely to be enforced there than in the United States.[367] Such an award might be faulty, but nevertheless be enforced even in a third country. Thus, there would be no occasion for the United States courts to police the award at the enforcement stage. The solution, the critics argue, lies in controlling the subject matter of the arbitration, a conduct that is authorized by the Convention.[368]

In general, the critics have a valid argument if the subject matter of the arbitration is considered to be one of fundamental value

363. *Soler*, 473 U.S. at 632-34.

364. *Id.* In a footnote, the Court gives a warning that it would not hesitate to condemn an agreement to arbitrate as against public policy if a choice of law clause worked as a prospective waiver of statutory claims under the antitrust law. *Id.* at n.19.

365. *Id.* at 638.

366. *See* Lipner, *International Antitrust Law: To Arbitrate or Not to Arbitrate*, 19 GEO. WASH. J. INT'L L. & ECON. 395, 414 (1985).

367. *Id.* at 426.

368. Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 VAND. J. TRANSNAT'L L. 265, 270, 280 (1986) [hereinafter Carbonneau, *Assessing the Folly*].

systems or deeply rooted morality. Furthermore, questions of arbitrability may be determined by statute. In the case of the United States, the FAA addresses these concerns. The Court has correctly interpreted the FAA as not shielding commercial disputes even if they are antitrust claims. Saying that antitrust disputes are arbitrable does not deny the national policy interest embodied in the Sherman Act. International intercourse is generally based on the good faith of the participants. The efficacy of the Convention hinges on whether contracting states would, in good faith, apply its provisions.[369] The *Soler* Court adopted the proper stance by relying on the arbitrators to apply the proper law of the contract, and Japan to follow the provisions of the Convention. There was no reason not to allow the system agreed upon by the contracting states to work.

However, the critics have other concerns. The public policy exception, it has been argued, "would eventually cloud an already limpid international standard."[370] The Court in *Soler* issued a veiled threat which would result in pressuring arbitrators to conclude that U.S. law applies, when it does not, in order to avoid any subsequent enforcement problems.[371] The danger of issuing an unenforceable award or judgment is not a creation of the U.S. Supreme Court. In most countries, foreign country arbitral awards and judgments may be unenforceable on public policy grounds. It is a fact which the Convention codified in Article V 2(b). The real issue is how the contracting states would use the public policy exception in the enforcement of arbitral awards.

B. *Arbitration in California and Public Policy*

We have seen thus far that when the FAA is applicable the U.S. Supreme Court has stated unequivocably that section 2 establishes an emphatic federal policy favoring the enforcement of arbitration agreements. In a line of recent decisions, the Court has held that section 2 is preemptive of contradictory state laws on questions of arbitrability.[372] There are, however, some questions about the full

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369. Quigley, *supra* note 348, at 1070. The notion that treaties must be observed in good faith, or *pacta sunt servanda* is well established in international law. For an extensive discussion of the concept, *see* A. McNair, The Law of Treaties 493-505 (1961); S. Rosenne, The Law of Treaties 196 (1970); I. Sinclair, The Vienna Convention on the Law of Treaties (1973).

370. Carbonneau, *Assessing the Folly, supra* note 368, at 284.

371. *Id.* at 288. *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

372. *See supra* notes 284, 289, and 292.

extent of the preemptive scope of section 2. Several states, including California, have, over the years, established their own arbitration policies, statutes, and defenses to the enforcement of arbitration agreements. Did Congress, by passing section 2, intend to preempt the entire field on questions of arbitration? It is obvious that section 2 limits its application to maritime transactions and commercial contracts. So far as these two categories of agreements are concerned, there is strong language in the Court's recent decisions suggesting the preemption of contradictory state laws.[373] There are, nevertheless, several other categories of transactions and agreements to which section 2 would not be applicable or would be of doubtful application. For instance, section 2 might not cover employment contracts, interspousal maintenance and support transactions, child custody and support matters,[374] and several other noncommercial matters. More-

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373. *See supra* notes 292-317 and accompanying text.

374. One area in which arbitration agreements may be subject to only state laws and policies is family law. In general, the regulation of certain domestic relations falls within the domain of states. There is little doubt that questions of marriage, divorce, child custody, and support constitute important policy concerns in all states. There is, however, a question whether these policy concerns are so fundamental and deep that the basic principles of freedom of contract or party autonomy should not apply to transactions connected with them.

Suppose, for instance, that in a separation agreement, a husband and wife agree on the custody of their children, and the payment of support by the husband for the children and the mother. If this agreement contains an arbitration clause stating that any controversy arising from the agreement shall be submitted to arbitration, should the California courts enforce the arbitration clause? There are at least three parts to the agreement between the husband and the wife: (1) the child custody agreement; (2) the child support arrangement; and (3) the interspousal support settlement. Although all three fall under the general rubric of family relations, the policy considerations underlying each of them may be different. They are, nevertheless, still faced with the same basic policy questions; that is, whether the concerns of society over family matters are so important that they should be reserved exclusively for the courts.

Family law questions have always exercised the minds of jurists and the concerns of lawmakers. The literature dealing with societal concerns is so voluminous that only a sample will suffice here. *See* Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26 (1966); Krauskopf, *Divisible Divorce and Rights to Support, Property and Custody*, 24 OHIO ST. L.J. 346 (1963); Paulsen, *Support Rights and an Out-of-State Divorce*, 38 MINN. L. REV. 709 (1954). Child custody issues have in recent times taken on both national and international dimensions. The concern over custody battles resulted in the drafting of the Uniform Child Custody Jurisdiction Act (UCCJA) which has been adopted by all the states and the District of Columbia. *See* 9 U.L.A. 115 (1968). For commentary on the UCCJA, *see* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969); Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203 (1981). The concern of society is further manifested in the attempts to stop child kidnapping through federal legislation. Congress enacted the Parental Kidnapping Prevention Act (PKPA) in 1980. *See* Pub. L. No. 96-611, 94 Stat. 3566 (1980) (codified as amended in scattered titles and sections of the U.S.C.). For commentary on this Act, *see* Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297 (1981); Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L.

over, to the extent that Congress has not defined what constitutes commerce, and the question of interpretation of the scope of the Commerce Clause by the U.S. Supreme Court is unsettled,[375] it is uncertain whether the states do not retain certain powers to regulate arbitration agreements under their own statutes. In view of these uncertainties, some time will be devoted to California policies and laws on arbitration.

In 1927, two years after the passage of the FAA, California adopted its first modern arbitration statute, modelled after the federal statute. It made arbitration agreements enforceable on terms similar to those of section 2 of the FAA. In 1961, it passed its current arbitration statute retaining substantially the same philosophy towards arbitration agreements.[376] The general rule in California is that the courts should take every step to enforce arbitration agreements unless

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REV. 711 (1982). In the international context, there is the Hague Convention on Civil Aspects of Child Abduction designed to coordinate efforts in solving the problem. *See* 19 I.L.M. 1501, *reprinted in* 51 Fed. Reg. 10,498 (1986). For commentaries on the Hague Convention, *see* Auton, *The Hague Convention on Interntional Child Abduction*, 30 INT'L & COMP. L.Q. 537 (1981); Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99 (1980). The nature and extent of both federal and state government involvement in custody, maintenance, and support matters clearly demonstrates social policy concerns.

On the question whether family disputes should be arbitrable, *see* Stark, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981). Virtually all known cases dealing with the arbitrability of family disputes are New York cases. The courts of New York are understandably divided over the issue on public policy grounds. *See, e.g.*, Sheets v. Sheets, 22 A.D.2d 176, 179, 254 N.Y.S.2d 320, 323 (1964) (custody decree in separation agreement arbitrable only if arbitral award is subject to court review to accommodate policy interest involved). For a contrary holding, *see* Agur v. Agur, 32 A.D.2d 16, 298 N.Y.S.2d 772, (1969), where it was held that the state had an overriding interest as *parens patriae* in the protection of minor children which could best be achieved through the courts, thus making custody issues non-arbitrable on public policy grounds. For the arbitrability of child support, *see* Schneider v. Schneider, 17 N.Y.2d 123, 216 N.E.2d 318, 269 N.Y.S.2d 107 (1966) (child support agreements between parents held arbitrable). For interspousal support, *see* Hirsch v. Hirsch, 37 N.Y.2d 322, 333 N.E.2d 371, 372 N.Y.S.2d 71 (1975), where the New York Court of Appeals rejected the public policy defense to the arbitration of interspousal support and maintenance agreements without explanation.

375. In its latest interpretation of the Commerce Clause, the United States Supreme Court continues to view Congressional power under the Commerce Clause to be very broad. Once Congress determines through some rational basis that a particular activity affects interstate commerce, it may regulate it. Thus, in Hodel v. Virginia Surface Min. & Reclam. Ass'n, 452 U.S. 264 (1980), it was held that the power of Congress under the Commerce Clause was broad enough to permit regulation of activities causing air and water pollution and other environmental hazards. *Id.* at 282. It also empowered Congress to regulate surface coal mining on private land. *Id.* at 290. However, in a separate opinion, Justice Rehnquist argued that congressional power under the Commerce Clause was limited to the regulation of activities which have some substantial effect on interstate commerce. *Id.* at 310-11. (Rehnquist, C.J., concurring). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 310-11 (2d ed. 1988).

376. CAL. CIV. PROC. CODE § 1280 (West 1982 & Supp. 1989).

the particular dispute is *not* covered by the agreement.[377] This general rule is best captured in the following statement by the Court of Appeals:

> Arbitration is highly favored as a method for settling disputes. . . . Courts should indulge every intendment to give effect to such proceedings. . .and order arbitration unless it can be said with assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.[378]

The friendly judicial attitude towards arbitration was further stressed by the California Supreme Court in *Keating*.[379] Similar to the attitude adopted by the U.S. Supreme Court, California courts have constantly used liberal interpretation of arbitration agreements to include tort claims that have their roots in a contractual relationship between the parties.[380] So strong is this policy favoring enforcing arbitration agreements that the courts closely examine most defenses to their enforcement. For instance, in *Keating* the court noted that any claims of the waiver of the right to arbitration must be closely scrutinized.[381] Moreover, the claim that an arbitration agreement is part of a contract of adhesion has no automatic appeal. Arbitration agreements found in contracts of adhesion should be enforced unless they do not fall within the reasonable expectations of the weaker party, or they are unduly oppressive or unconscionable.[382]

Notwithstanding the favorable legislative and judicial attitude towards arbitration, the Supreme Court of California has recognized certain possible public policy defenses to the enforcement of arbitration agreements. These exceptions include agreements to arbitrate various sales agreements, the liquidation of insolvent insurance companies, antitrust claims, and claims based on regulatory statutes where the public interest is best served by requiring only a judicial remedy. After the recent U.S. Supreme Court decisions in *Soler*, *McMahon*,

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377. *See* Pacific Investment Co. v. Townsend, 58 Cal. App. 3d 1, 19, 129 Cal. Rptr. 489 (1976); Lewsadder v. Mitchum, Jones & Templeton, Inc., 36 Cal. App. 3d 255, 259, 111 Cal. Rptr. 405 (1973); Berman v. Dean Witter & Co., Inc., 44 Cal. App. 3d 999, 1003, 119 Cal. Rptr. 130 (1975).

378. *Pacific Investment Co.*, 58 Cal. App. 3d at 9.

379. Keating v. Superior Court, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982).

380. *Pacific Investment Co.*, 58 Cal. App. 3d at 1.

381. *Keating*, 31 Cal. 3d at 604.

382. *Id.* at 594. *See also* Graham v. Scissor-Tail Inc., 28 Cal. 3d 80, 623 P.2d 165, 171 Cal. Rptr. 604, 616 (1981), where the California Supreme Court held that an arbitration agreement may not be enforced if it is deemed to be unconscionable. Note, Graham v. Scissor-Tail, Inc.: *Unconscionability of Presumptive Biased Arbitration Clauses Within Adhesion Contracts*, 70 CALIF. L. REV. 1014 (1982).

and *Rodriguez*, these defenses are of doubtful validity.[383] The public interest doctrine was also addressed by the California Court of Appeals in *Bos Material Hauling, Inc. v. Crowen Controls Corp.*,[384] which was decided in 1982 after *Keating*.

The controversy in *Bos* centered around the enforceability of an arbitration agreement in a year-to-year dealership contract. The agreement in question contained an arbitration clause requiring the arbitration of disputes in Dayton, Ohio and under Ohio law. Among other questions, the court was presented, for the first time, with the issue of the arbitrability of antitrust claims under the California antitrust statute, the Cartwright Act.[385] This statute was patterned after the federal Sherman Act and similar statutes in other states. Naturally, the court was influenced by federal jurisprudence on the matter, other states' laws, policies and judicial interpretation of these laws, and policies on the question of the arbitrability of antitrust claims.

One of the earliest cases dealing with the public policy considerations on this question was the landmark decision in a New York case, *Aimcee Wholesale Corp. v. Tamar Products Inc.*[386] The New York Court of Appeals in this case held that the enforcement of the Donnelly Act, the state antitrust statute, could not be left to arbitrators. It reasoned that antitrust questions implicated public policy concerns of the first magnitude.[387] According to the court, so pervasively important was the public policy interest in issues of economic liberty, free and unfettered competition that the Donnelly Act codified it.[388] Moreover, the court felt that arbitration would undermine the efficacy of the deterrent policies of antitrust laws. The efficacy of antitrust laws, the court argued, were linked to the fear of excessive damages, treble damages, and the significant and often burdensome jury verdicts.[389] Knowledge of these possible damages constitutes an effective deterrent tool which would be lost in fair compensations awarded by arbitrators. Without saying so, the court seemed to have

383. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Shearson/American Express v. McMahon, 482 U.S. 220 (1987); Rodriguez v. Shearson/American Express, 109 S. Ct. 1917 (1989).
384. 137 Cal. App. 3d 99, 186 Cal. Rptr. 740 (1982).
385. *Id.* at 109.
386. 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).
387. *Id.* at 625.
388. *Id.* at 626.
389. *Id.*

been employing public policy in its protective sense suggested by the Lord Chief Baron in the *Egerton* case.[390]

The California Court of Appeals relied on the policy analysis in *Aimcee*. It also relied on federal precedents, particularly U.S. Supreme Court decisions which held that statutory claims, including antitrust claims, were non-arbitrable. It specifically relied on *American Safety* and *Wilko*.[391] Based on these cases, the court held that the Cartwright Act was an expression of the fundamental policy of California to preserve free and unfettered competition.[392] Accordingly, it decided to follow the mainstream of judicial opinion and held that claims under the Cartwright Act could not be excluded from judicial scrutiny and determination through private contractual agreements.[393]

The U.S. Supreme Court decision in *Soler*[394] may have changed all this, however. One of the issues the court had to decide in *Soler*, was the arbitrability of antitrust claims in international commercial disputes. Relying on the *American Safety* doctrine, it was argued that antitrust claims, being statutory, were non-arbitrable. The Supreme Court dealt with this argument by examining the full scope of the *American safety* doctrine. According to the Court, this doctrine was premised on several factors: (1) the pervasive public interest in the enforcement of antitrust claims; (2) the pivotal role of private parties in the enforcement of antitrust laws; and (3) the fundamental importance of antitrust laws to democratic capitalism.[395] In addressing the role and impact of the *American Safety* doctrine, the Court returned to the basic and fundamental question: What did Congress intend by passing the Sherman and Clayton Acts?

While admitting the public interest argument and the importance of treble damages in private litigation in enforcing antitrust laws, the Court could not find any congressional intent compelling the conclusion that antitrust claims must be submitted only to American courts.[396] After examining the legislative history of the two statutes, the Court concluded that section 4 of the Clayton Act and Section 7 of the Sherman Act were conceived of, primarily, as a remedy for the

390. Egerton v. Brownlow, [1853] 10 Eng. Rep. 359.
391. Bos Material Hauling, Inc. v. Crowen Controls Corp., 137 Cal. App. 3d 99, 110, 186 Cal. Rptr. 740 (1982).
392. *Id.* at 111.
393. *Id.*
394. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
395. *Id.* at 632.
396. *Id.* at 635-37.

people of the United States as individuals.[397] Their basic purpose was compensating injured parties, not levying a penalty. Although treble damages would penalize wrongdoing, and thereby produce some deterrent effect, the provisions did not create rights in society at large.[398] Like punitive damages, treble damages may penalize without becoming penal. If they could be characterized as penal, there would be a strong public policy reason for not enforcing the arbitration agreement.

However, the fact that Congress did not intend to insulate antitrust claims from arbitration does not mean that there are no overriding public policy reasons for not enforcing such arbitration agreements. One commentator has argued that public policy should be invoked to stop the arbitration of claims where the legislative intent behind a statute is to achieve some purpose other than justice between the parties to the dispute.[399] According to this view, antitrust claims, because of the pervasive public interest in democratic capitalism, would fall into this category. On its face, this argument seems rational and interesting. Unfortunately, the author fails to define public policy. Thus, it leaves the implication that every statute concerned with more than justice between parties is an expression of public policy. Virtually every statute designed to support free enterprise, facilitate commerce, or encourage capitalism would fall into this category. Justice between the parties to a dispute has definite social and jurisprudential utility. It helps to bolster confidence in the system of justice through the law, even though it may be merely compensatory. Without defining public policy, this concept could constitute yet another wide loophole to avoid the enforcement of arbitration agreements.

Moreover, the recent U.S. Supreme Court decisions discussed above might make our discussion here merely academic. It may be recalled that in *McMahon* the Court held that claims under the Securities Exchange Act of 1934 were arbitrable.[400] It also held that civil claims under the Racketeer Influenced and Corrupt Organization Act (RICO) are arbitrable.[401] Furthermore, it overruled its own precedent in *Wilko*, holding that claims under the Securities Act of 1933 were

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397. *Id.* at 636.
398. *Id.*
399. *See* Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 483 (1981).
400. Shearson/American Express v. McMahon, 482 U.S. 220 (1987).
401. *Id.*

arbitrable.[402] The public interest in these statutes can hardly be doubted. But the Court could not find any congressional intent to insulate civil claims arising under these statutes from arbitral tribunals. The public interest in these statutes is further demonstrated by the existence of criminal provisions designed to protect the public and punish certain types of conduct. One would then have expected that the public interest in civil claims under these statutes would rise to the level of fundamental public policy overriding arbitration agreements. The U.S. Supreme Court held, however, that such overriding public policy interests must be found not in its previous decisions, but within *the narrow confines of congressional intent.*

Thus, the fundamental question that needs resolution is whether the Cartwright Act of California can now be interpreted to require only judicial resolution of antitrust claims. Any answer to this question will again be confronted with the preemption issue and the legislative intent of the California Legislature. In *Keating*, the U.S. Supreme Court ruled that section 2 of the FAA created substantive federal rights enforceable in state and federal courts.[403] The enactment of section 2 was the exercise of congressional powers under the Commerce Clause. As interpreted by the U.S. Supreme Court, the Commerce Clause has no definite meaning, nor does it have concrete contours predetermining its application.[404] It is then possible that certain categories of activities may well fall outside its ambit and exclusively within the domain of state laws. To the extent that this is the case, discovering the legislative intent behind the Cartwright Act becomes crucial.

In *Bos*, the California Court of Appeals argued that by adopting an antitrust statute similar to the Sherman Act and that of New York, the California Legislature intended to codify the fundamental policies expressed in those laws.[405] There are two possible implications of this interpretation. The California Legislature might have intended to codify the particular meaning attributed to the Sherman Act and the Donnelly Act at that point in time. In that case, subsequent changes in those laws should not affect the legislative intent. On the other hand, the state legislature, being sensitive to the need for a coherent federal system, might have intended to adopt policies that

402. Rodriguez v. Shearson/American Express, 109 S. Ct. 1917 (1989).
403. Southland Corp. v. Keating, 465 U.S. 1 (1984).
404. *See* Hodel v. Virginia Surface Mining and Reclam. Ass'n, 452 U.S. 264 (1981).
405. Bos Material Hauling, Inc. v. Crowen Controls Corp., 137 Cal. App. 3d 99, 111, 186 Cal. Rptr. 740 (1982).

would coordinate with and facilitate federal policies in the field.[406] Thus, federal precedents that formed the basis for state legislation would not be petrified, but would rather be allowed to affect the interpretation of such statutes when modified or overruled by the federal courts. Indeed, it may be argued that a reasonable legislature that relies on a judicially determined rule or the judicial interpretation of a statute intends to be bound by subsequent changes in the rule or interpretation, especially on a subject requiring harmony in policies. As is apparent from this discussion, the issue of determining the appropriate legislative intent under these circumstances is complex and remains an area in which the U.S. Supreme Court may have to decide in the future.

C. *Public Policy and Enforcement of Arbitral Awards*

An arbitration award is generally not self-enforcing in the United States. A party to a domestic California or international arbitral award may petition a court to recognize, confirm, enforce, correct, or vacate the award. In the case of awards covered by the FAA, the Act provides grounds for challenging awards within the courts.[407] The

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406. One goal of statutory interpretation may be the achievement of uniformity and consistency in an area of importance. In *Rodriguez*, 109 S. Ct. at 1922, Justice Kennedy, writing for the Court, explained why the Supreme Court construed section 2 of the Federal Arbitration Act to overrule its own precedent, an act which the Court does not undertake lightly, in these words:

> Although we are normally and properly reluctant to overturn our decisions construing statutes, we have done so to achieve a uniform interpretation of similar statutory language, . . . and to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy as expressed in other legislation. . . . Both purposes would be served here by overruling the *Wilko* decision.

Id. at 1922.

407. Section 9 of the FAA deals with Arbitral Awards: confirmation, jurisdiction, and procedure. Section 10 deals with the grounds for vacation. Section 10 states:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1988).

statutory basis for judicial review of arbitral awards does not include the public policy exception. Moreover, it is a well settled principle that judicial review of arbitral awards should be very narrow.[408] In California, the grounds for the vacation of an award are set out in sections 1286.2 of the California Arbitration Act.[409] Conspicuously absent in this section is the public policy exception. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, on the other hand, provides in Article V(2)(b) for the public policy defense to the enforcement of foreign arbitral awards.

Notwithstanding the absence of specific statutory language in the California Arbitration Act or the FAA supporting the public policy defense, courts have over the years, and on occasion, based their refusal to recognize or enforce domestic arbitral awards on public policy grounds. The courts took the position that granting a motion to vacate an award on public grounds served the interest of justice.[410] They equated these motions with suits in equity, which provided equitable relief as a supplement to inadequate statutory remedies.[411] In this section, we shall review briefly the use of the public policy exception in the enforcement of international, federal, and California arbitral awards. Bearing in mind that the U.S. Supreme Court has ruled that U.S. courts should rely on the public policy exception at the award enforcement stage to police any excesses in foreign arbitration processes, it is important to determine how the courts have

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408. Diapulse Corp. of America v. Carba Ltd., 626 F.2d 1108 (2d Cir. 1980).

409. The grounds for the vacation of an award as set out in section 1286.2 of the Arbitration Act are that:

a. The award was procured by corruption, fraud or other undue means;

b. There was corruption in any of the arbitrators;

c. The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;

d. The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or

e. The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators contrary to the provisions of this title.

An award may be corrected if the court determines that:

a. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

b. The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or

c. The award is imperfect in a matter of form, not affecting the merits of the controversy.

CAL. CIV. PROC. CODE § 1286.2 (West 1982).

410. First National Oil Corp. v. Arrieta, 2 Misc. 2d 225, 151 N.Y.S.2d 309 (1956).

411. Finsilver Still & Moss Inc. v. Goldberg, Mass & Co., 253 N.Y. 382, 171 N.E. 579 (1930); Schafran & Finkel v. M. Lowenstein & Sons, Inc., 280 N.Y. 164, 19 N.E.2d 1005 (1939).

responded. Besides, it should also be of interest to determine whether or not the nature and character of the public policy exception varies with the origins of the award (i.e., state, federal, or international) sought to be enforced.

The leading case dealing with the enforcement of international abritral awards in the United States is the Second Circuit Court of Appeals' decision in *Parsons & Whittemore Overseas Co., Inc. v. Société Genérale de L'Industrie du Papier (RAKTA).*[412] *Parsons & Whittemore* involved a challenge to the entry of a summary judgment pursuant to a foreign arbitral award in favor of RAKTA. The appellants, Parsons, relying on the New York Convention, claimed that enforcing the award would be contrary to the public policy of the United States. The claimed U.S. public policy could be found in the breach of diplomatic relations between the United States and Egypt during the Six Day War between Egypt and Israel. Parsons argued that they could not perform their contract, on which the award was issued, for valid reasons. The termination was necessitated by *force majeure*; that is, the termination of diplomatic relations. They also argued that the U.S. Agency for International Development, which provided the financial backing to the project, withdrew its support. From these events, one could discern a U.S. national policy which they, as U.S. nationals, could not contravene.

The Court answered the public policy objection by examining the legislative history and intellectual commentary on the Convention. It found that the drafters intended to keep the public policy defense narrowly confined.[413] Of greater importance to the Court was the history of the Convention and what inferences one could draw from it. From this history, the Court concluded that:

> [t]he general pro-enforcement bias in forming the Convention and explaining its super-session of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement.[414]

The Court was concerned with yet another goal of the Convention: reciprocity. An unrestrained use of the public policy defense might

412. 508 F.2d 969 (2d Cir. 1974).

413. *Id.* at 973. There is some controversy among commentators over the confines of the public policy defense. *See* Contini, *supra* note 346, at 304, where he argues that the intent was to narrow the scope of the public policy defense. For a contrary position *see* Quigley, *supra* note 348, at 1070-71.

414. *Parsons & Whittemore*, 508 F.2d at 973.

encourage foreign courts to adopt and apply the public policy exception broadly against awards issued in the United States. For these reasons, the Court held that the public policy defense under the Convention should be construed narrowly. More specifically, the Court held that "enforcement of foreign arbitral awards may be denied [on public policy grounds] *only* where enforcement would violate the forum states most basic notions of morality and justice."[415] What is of interest to us is that the Court relied on the most popular and narrow definition of public policy in the United States, announced by Judge Cardozo in *Loucks v. Standard Oil Co.*[416]

In the case at hand, the Court explained that the appellant's public policy defense was not meritorious. One could not equate any discernible United States national policy in that case with public policy. The public policy defense, the Court explained further, was not intended to be subjected to the vagaries of international politics.[417]

It has been demonstrated above that the interpretation of the FAA has produced nothing but divergent views among the circuit courts on several important questions. In the case of the meaning and scope of the public policy defense under the Convention, there is, so far, welcome uniformity and consistency among the courts. Other circuit courts using different terminologies have adopted narrow interpretations of the public policy exception comparable to that of the *Parsons & Whittemore* court.[418] Federal district courts have consistently relied on *Parsons & Whittemore* to reject the public policy defense. For instance, in one case, a federal district court rejected the public policy defense to a unanimous foreign arbitral award based on allegations of bias or the likelihood of bias.[419] The court considered it important to note that the public policy defense should be invoked with caution. The public policy defense was also rejected in enforcement proceedings before another district where fraud and "manifest disregard of the law" were alleged.[420] In rejecting the argument, the

415. *Id.* at 974 (emphasis added).
416. 224 N.Y. 99, 111, 120 N.E. 198 (1918).
417. *Parsons & Whittemore*, 508 F.2d at 974.
418. For more record, *see* Foto Clirome, Inc. v. Cepal Compal Ltd., 517 F.2d 512 (2d Cir. 1975); Island Territory of Curacao v. Soritrou Devices, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974); Gulf States Telephone Co. v. Local 1692 Int'l Brotherhood of Electric Workers, 416 F.2d 198 (5th Cir. 1969); Revere Cooper and Brass Inc. v. Overseas Private Inv. Corp., 628 F.2d 81 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 983 (1980).
419. Fertilizer Corp. of India v. IDI Mgt. Inc., 517 F. Supp 948, 955 (S.D. Ohio 1981).
420. Brandeis Insel v. Calabrian Chem. Corp., 656 F. Supp. 160 (S.D.N.Y. 1987).

court noted that "efforts to vacate arbitral awards have met an almost total lack of success."[421] However, even if the defense were available, manifest disregard of law, whatever the phrase means, does not rise to the level of public policy under the Convention. The court examined the goals of the Convention as stated by the U.S. Supreme Court in *Scherk*: 1) to encourage recognition and enforcement of arbitral awards; and 2) to unify the standards for the enforcement of arbitration agreements. It concluded that "salutary goal and purpose will be better achieved by applying to proceedings brought in this country to enforce foreign arbitral awards the narrow concept of public policy. . . ."[422]

From these cases, one conclusion is inescapable. A reliance on Cardozo's narrowly crafted public policy exception means that U.S. courts will not favorably entertain the public policy defense under the Convention unless the implicated policy is deeply rooted or of fundamental importance. Mere allegations of some wrongdoing by the arbitrator not covered by the Convention would probably be unrewarding. A court cannot reject enforcement of a foreign award merely because it disagrees with the outcome or the interpretation of a contract by the arbitrator. The alleged public policy to be violated must then be clear, definite, and significant.[423]

The unwillingness of the courts to allow the losing party in an arbitration process to whittle away the sanctity of contract and undermine the process has even deeper roots in U.S. federal arbitration law. The courts have consistently taken the position that judicial review of arbitral awards must be limited in scope. Otherwise, the federal policy of enforcing arbitration agreements could be subverted. There are, however, some cases where judicial review and rejection of arbitral awards on public policy grounds may be required. Prominent among these cases are those dealing with arbitral awards in the labor law area.[424] Arbitral awards from labor disputes and collective bargaining agreements may negatively affect the constitutional and

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421. *Id.* at 164.

422. *Id.* at 167.

423. United Steelworkers of America v. Enterprise & Car Corp., 363 U.S. 593, 596 (1960). Where the Court found a clear public policy interest violated or threatened by the enforcement of the award, they would normally vacate the award. *See, e.g.*, International Ass'n of Machinists Dist. No. 8 v. Campbell Soup Co., 406 F.2d 1223 (7th Cir. 1969), *cert. denied*, 396 U.S. 820 (1969); United States Postal Serv. v. American Postal Workers, 736 F.2d 822, 824 (1st Cir. 1984); Local No. P-1236, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Jones Dairy Farm, 680 F.2d 1142, 1145 (7th Cir. 1982).

424. *See* Levine, *Judicial Review of Arbitration Awards: Criticism and Remedies*, 10 EMPLOYEE REL. L.J. 669 (1985).

other statutorily protected rights of individuals. The courts have established precedents for reviewing and vacating such awards on public policy grounds.[425] The importance of public policy in anti-discriminatory statutes, often implicated in such awards, is hardly in doubt. Federal courts have for years used the public policy exception to defeat the enforcement of arbitral awards when they felt it was necessary. For instance, an award obtained through duress,[426] or compelling the breach of law or some settled policy,[427] may be vacated on public policy grounds. Also, an award that compelled the reinstatement of a truck driver who had admitted drinking before overturning an eighteen wheel rig was vacated on public policy ground.[428] Enforcing that award would be contrary to the settled federal policy against drinking and driving.[429] In other cases, the courts rejected arbitral awards that would compromise public safety[430] and public health,[431] or condone embezzlement, graft, or the breach of fiduciary duties.[432] While rejecting these awards, the courts have at the same time maintained that the public policy defense is not available to every party for all alleged transgressions. Again, the emphasis maintained by the courts has been on the seriousness of the alleged public policy affected.

In California, awards have been set aside when they are found to be against general public policy and illegal. In *Loving & Evans v. Blick*,[433] the court stated that the power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which rights might arise. A claim arising out of an illegal transaction is, thus, not a proper subject for arbitration. An award granted from such an illegal contract stands on no higher ground than the contract itself and no court will enforce it. In that case, the court, having found the underlying contract entered into

425. *See* "Steelworkers Trilogy" cases cited *supra* note 318.
426. Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G., 480 F. Supp. 352 (S.D.N.Y. 1979).
427. Gulf States Telephone Co. v. Local 1692 Int'l Brotherhood of Electric Workers, 416 F.2d 198, 201 (5th Cir. 1969).
428. Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122, 125 (5th Cir. 1983).
429. *Id.*
430. World Airways Inc. v. International Brotherhood of Teamsters Airline Div., 578 F.2d 800, 803 (9th Cir. 1978).
431. Local No. P-1236, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Jones Dairy Farm, 680 F.2d 1142, 1145 (7th Cir. 1982).
432. United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822, 825 (1st Cir. 1984).
433. 33 Cal. 2d 603, 204 P.2d 23 (1949).

by an unlicensed contractor to be void, held that a contract expressly declared by law to be illegal and against the public policy of the state was not enforceable.[434]

Public policy does not only bar the enforcement of awards when the underlying contract is illegal. If the award commands an act which is unlawful or against public policy, it will be vacated. In *Black v. Cutter Laboratories*,[435] the Supreme Court of California held that it was against the public policy of California to enforce an award compelling the reinstatement of a member of the communist party. Of importance to the court was the fact that the employee was dedicated to the party's program of sabotage, force, and violence. The employee also worked in a plant that produced antibiotics used by both the military and civilians. It was concluded that there existed federal and state public policy and laws against enforcing the award.[436]

Ordinarily, errors in law or fact committed by the arbitrator are not grounds for vacating the award where an issue is not in the scope of the submission agreement and the parties have agreed to be bound by the award. An exception applies when the error appears on the face of the award and causes substantial injustice. In *Kirby Campbell v. Farmers Ins. Exchange*,[437] an arbitrator made an award in excess of the limit stated in the insurance policy, subject matter of the arbitration. The court held that the public policy favoring arbitration and the finality of an arbitration award does not compel judicial confirmation of an award which, on its face, represents a manifest injustice to one of the parties.

D. *Summary*

The central tenet of the current debate among intellectual commentators and the courts over the FAA is the extent of its preemptive reach. The public policy exception is a defense to the enforcement of arbitration agreements. Thus, the question investigated is whether the public policy exception exists within the FAA and, if so, whether it is a question of federal or state law. While an answer to this question raises significant issues of U.S. federalism, statutory interpretation, and choice of law, it has been demonstrated that the answer can be found by discovering the legislative intent of Congress. Neither

434. *Id.* at 609.
435. 43 Cal. 2d 788, 278 P.2d 905 (1955).
436. *Id.* at 798-99.
437. 260 Cal. App. 2d 105, 67 Cal. Rptr. 175 (1968).

from the plain meaning of section 2 of the FAA, nor from its legislative history, can one find a clear intent of Congress to preempt non-discriminary state law defenses to the enforcement of arbitration agreements. The public policy defense is, therefore, available under state law notwithstanding some language in recent Supreme Court decisions to the contrary. A careful reading of *Moses*, *Keating*, and *Volt Information Sciences* will confirm that Congress had two primary goals: (1) eliminating the hostility toward arbitration agreements, and (2) putting arbitration agreements on the same footing with other contracts. The basic defenses to any contract are governed by state law. The goals of equality of treatment will be frustrated if the defenses to arbitration agreements are governed by a separate body of law other than state law. Thus, the public policy defense must be a question of state not federal common law.

Granting that this finding of congressional intent is accurate, party autonomy would be available to the parties to an arbitration agreement. The exercise of that party autonomy, however, may be checked by the public policy exception under non-discriminatory state law. Permitting freedom of contract in this case would again be consistent with congressional intent in passing the FAA.

There is little doubt now that the *Bremen* decision ushered in a new era of judicial internationalism. The Supreme Court demonstrated an enlightened outlook on global trade questions, holding that American traders could no longer conduct international trade on their own terms and under the protective veil of U.S. laws. The *Scherk* and *Soler* decisions reinforced and broadened this enlightened judicial globalism by drawing a distinction between international and domestic transactions on the question of arbitration. Notwithstanding the fact that *Bremen* itself was an international dispute, the Court seems unwilling to allow the public policy exception announced in that case to apply to international arbitration cases. The reluctance may be induced by the Court's perceptions of U.S. obligations under the New York Convention, the national policy favoring enforcing arbitration agreements, and the need to minimize the burden of excessive litigation on U.S. courts.

In conclusion, while implicitly preserving the public policy defense in the enforcement of pre-dispute agreements, the U.S. Supreme Court is unlikely to allow that defense unless the public policy implicated is *real* and *fundamental*. Mere public interest, as in the case of securities transactions or antitrust violations, is not a sufficient public policy reason for the revocation of pre-dispute agreements to

arbitrate. This is especially true when Congress has spoken on the matter. By stressing the public policy exception in post-award enforcement proceedings, the Court seems to provide a window to state courts for the use of their own public policy.

V. The Enforcement of Foreign Judgments in California

Generally, any judgment rendered by the courts of a sister state or a foreign country is considered in California as a foreign judgment.[438] The enforcement of foreign judgments in California, as in other states of the United States, is controlled to a large extent by the Full Faith and Credit Clause of the United States Constitution,[439] and by the pervasive national policy of preclusion limiting repetitive litigation.[440] The policy of preclusion was clearly articulated by the U.S. Supreme Court in a 1931 opinion when it stated that "one trial of one issue is enough."[441] In a federal union such as the United States, it is necessary to weld the different territorial units together on critical and potentially divisive issues.[442] The policy of preclusion was, therefore, designed to assist the courts in the forging of a unified and coherent federal system. The achievement of this goal required the application of a single policy to all the states even if that meant paying dearly for it.[443] The nature and extent of the preclusive effects of a foreign judgment in California arise whenever an enforcement is sought by a judgment creditor. If the states are permitted to determine the effects of sister state judgments within their own borders, it would undermine the unifying goals of federalism.[444] The broader goals of federalism and the unity of the nation

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438. *See* Scoles & Hay, *supra* note 84, at 933.

439. *See, e.g.*, Fauntleroy v. Lum, 210 U.S. 230 (1908); Yarborough v. Yarborough, 290 U.S. 202 (1933); and Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980).

440. Scoles & Hay, *supra* note 84, at 918-25. *See generally* C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure (1981); G. Hazard, Civil Procedure (2d ed. 1977); Note, *Development in the Law: Res Judicata*, 65 Harv. L. Rev. 818 (1952); Reese & Johnson, *The Scope of the Full Faith and Credit Clause to Judgments*, 49 Colum. L. Rev. 153 (1949).

441. Baldwin v. Iowa State Travelling Men's Ass'n, 283 U.S. 522, 525 (1931).

442. The history of the Full Faith and Credit Clause explains its overall importance to the federal system. *See* Cook, *The Powers of Congress Under the "Full Faith and Credit" Clause*, 28 Yale L.J. 421 (1919); Corwin, *The "Full Faith and Credit" Clause*, 81 U. Pa. L. Rev. 371 (1933); Costigan, *The History of the Adoption of Section 1 of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation*, 4 Colum. L. Rev. 470 (1904); Ross, *"Full Faith and Credit" in a Federal System*, 20 Minn. L. Rev. 140 (1936).

443. *See In re* Morris' Estate, 56 Cal. App. 2d 715, 723, 133 P.2d 452 (1943); Atherton v. Atherton, 181 U.S. 155 (1900).

444. *See* sources cited *supra* note 442.

have for years formed the bedrock on which the U.S. Supreme Court built its edifice of federal jurisprudence on this subject.

The courts of California are not, therefore, at liberty to decide what effects *all* foreign judgments have within its borders. The Full Faith and Credit Clause of the U.S. Constitution and its accompanying federal statute mandate that:

> the records and judicial proceedings of any court of any state—shall have the full faith and credit in every court within the United States—as they have by law or usage in the courts of the State—from which they are taken.[445]

It is obvious from this language that the federal Constitution imposes a positive obligation on federal and state courts to recognize sister state judgments. Once it can be shown that a foreign judgment was rendered by a court of competent jurisdiction, the Full Faith and Credit Clause requires that the judgment be recognized and enforced by the courts of California unless, under law, or in equity, there are some defenses to the recognition and enforcement.[446] The Full Faith and Credit Clause does not apply, however, to foreign country judgments, nor is there any controlling federal statute on the subject.[447] The enforcement of foreign country judgments may then be governed by common law principles or any applicable state statutes.

The immediate task here is to determine the extent to which public policy constitutes a defence to the enforcement of foreign judgments in California. The literature on the enforcement of foreign judgments is voluminous and still growing.[448] In view of the limited scope of

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445. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1964 & Supp. 1989).

446. One requirement for enforcement is jurisdiction of the rendering court. *See* Durfee v. Duke, 375 U.S. 106 (1963); Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873). *See also* Boskey & Braucher, *Jurisdiction and Collateral Attack*, 40 COLUM. L. REV. 1006 (1940); Dobbs, *The Validation of Void Judgments: The Bootstrap Principle*, 53 VA. L. REV. 1003 (1967); Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164 (1977) (all discussing jurisdictional requirements).

447. *See* Hilton v. Guyot, 159 U.S. 113 (1895); Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220 (1972); von Mehren & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 LAW POL. & INT'L BUS. 37 (1974) [hereinafter von Mehren & Patterson]; von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1607 (1968).

448. *See generally* Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 188 (1919); Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44 (1962) [hereinafter Smit]; Comment, *Recognition of Foreign Country Divorces: Is Domicile Really Necessary?*, 40 CALIF. L. REV. 93 (1952); Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1 (1988); Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932) [hereinafter Leflar, *Extrastate Enforcement*]; Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950) [hereinafter Reese]; Homburger, *Recognition and Enforcement of Foreign Judgments*, 18 AM. J. COMP. L. 367 (1970).

this article and space considerations, much of that literature will not be reviewed here. This section will nevertheless address the basic rules applicable to the enforcement of foreign judgments. It will emphasize the possible defenses to enforcement and, in particular, the public policy defense.

There are two broad categories of foreign judgments that may be the subject of an enforcement concern in California: money judgments and equity decrees, and penal or tax judgments. The enforcement policies may differ between categories of judgments. In the case of foreign country judgments, the absence of a controlling federal statute may leave enforcement questions entirely to the states. Individual state policies may diverge from those of the federal government. The following sections will be devoted to an analysis of these categories of judgments and the public policy doctrine.

A. *Sister State Judgments:*

A useful starting point for a discussion of the public policy defense to the enforcement of foreign judgments is the Full Faith and Credit Clause of the U.S. Constitution and judicial interpretations of it. One of the leading cases on the topic was the U.S. Supreme Court decision in *Fauntleroy v. Lum.*[449] In *Fauntleroy*, an action was brought in Mississippi to enforce a Missouri judgment based on some gambling transactions in cotton futures allegedly in violation of Mississippi law. According to the judgment debtor, not only were these transactions illegal, but they were also criminal under Mississippi law. Having obtained an arbitration award in Mississippi on these illegal activities, the judgment creditor subsequently sued and obtained a Missouri judgment. The question presented before the U.S. Supreme Court was whether the Full Faith and Credit Clause required Mississippi to enforce the Missouri judgment notwithstanding the fact that the underlying transactions were illegal, void, and contrary to Mississippi public policy.

Writing for the majority, Justice Holmes argued that the commands of the Full Faith and Credit Clause were clear as to the duty imposed on sister states in the enforcement of judgment cases. Quoting from an often-cited earlier opinion of Justice Marshall, he stated that:

> The judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had

449. 210 U.S. 230 (1908).

> in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and non others, could be pleaded in any other court in the United States.[450]

Thus, it was held that the Missouri judgment was entitled to enforcement by the Mississippi court as long as the rendering court in Missouri was a court of competent jurisdiction and the judgment was final.[451] Neither the illegality of the original cause of action in Mississippi nor the contravention of the fundamental public policy of Mississippi could excuse the enforcement of the Missouri judgment.[452] Even though the Missouri court might have applied the wrong law, the Court noted that not even a mistake of law constituted a sufficient basis for the non-enforcement of the judgment. Furthermore, the fact that the arbitration award was probably void or unenforceable in Mississippi provided no legitimate basis for rejecting the Missouri judgment.

It is apparent from the language of the Full Faith and Credit Clause itself, and from the famous quoted statement of Chief Justice Marshall, that the rendering state is permitted to determine, but only indirectly, the extra-territorial effect of its judgments by prescribing these effects on judgments within its borders.[453] If the public policy defense is available in the rendering state, the enforcing state would be bound to recognize it. Where the rendering state does not recognize the public policy defense, however, the enforcing state may only inquire into the jurisdictional basis of the rendering court.[454] In *Fauntleroy*, the jurisdiction of the court was not in question, and neither was the judgment of the Missouri court impeachable in Missouri on public policy grounds. It followed then that a Mississippi court could not refuse recognition of the judgment on public policy grounds.[455]

The decision in *Fauntleroy* marked an important step in U.S. federalism. It forbade states from engaging in competitive and ultimately fissiparous evaluation of one another's substantive policies in the creation of legal rights and obligations as evidenced by state action. In one case, it was argued that recognizing divorce decrees

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450. *Id.* at 236.
451. *Id.*
452. *Id.*
453. This point was more elaborately developed by the United States Supreme Court in Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980).
454. *See* Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873); Williams v. State of North Carolina I, 317 U.S. 287 (1942); Williams v. State of North Carolina II, 325 U.S. 226 (1945).
455. *See* Fauntleory v. Lum, 210 U.S. 230, 236 (1908).

from states with lax divorce laws and procedures would seriously jeopardize the sovereignty of states which felt the need for stricter controls of marriage as an institution.[456] The U.S. Supreme Court rejected this argument, stating that the objection raised in that case would apply to all judgments.[457] While the Court recognized that giving full faith and credit to such judgments might produce certain undesirable consequences, it nevertheless concluded that "[s]uch is part of the price of our federalism."[458] Little wonder then that the rationale of *Fauntleroy* has remained intact over the years. A few cases will illustrate this point. In *Yarborough v. Yarborough*,[459] the U.S. Supreme Court held that a Georgia permanent child support decree precluded any subsequent modification of the support by a South Carolina court after the child had been moved there. As *parens patriae*, South Carolina had a legitimate policy interest in the maintenance and support of its minor children. In addition, the child's condition had changed, requiring additional funds for her education. Yet, and against a strong dissent,[460] the Court held that the permanent, total, and final nature of the Georgia decree terminated any further obligations of the child's father. It, therefore, concluded that the decree must be recognized by the South Carolina court.[461] Thus, *Fauntleroy* and *Yarborough* stand for the proposition that a state cannot invoke its own public policy or interest against a sister state judgment.

The underlying rationale or theme in *Fauntleroy* continues to hold true today in other areas as evidenced in the Court's latest opinion on the subject in a workers compensation case, *Thomas v. Washington Gas Light Co.*[462] A sharply divided Court held that the Full Faith and Credit Clause did not preclude the District of Columbia from granting a worker's compensation award supplementary to that already granted by Virginia.[463] The Court arrived at this conclusion through a circuitous route and sharp disagreement. It engaged in an analysis of the respective and competing interests of the two states. It examined the nature of worker compensation proceedings, the

456. *See In re* Morris' Estate, 56 Cal. App. 2d 715, 723, 133 P.2d 452 (1943).
457. *Williams I*, 317 U.S. at 302.
458. *Id.*
459. 290 U.S. 202 (1933).
460. *Id.* at 213 (Stone, J., dissenting). Justice Stone's dissent was strongly worded and became famous among scholars in Conflict of Laws textbooks.
461. *Id.*
462. 448 U.S. 261 (1980).
463. *Id.* at 279.

powers of the Virginia tribunal, and the Court's precedent.[464] From this approach, one could wrongly be misled by *Washington Gas* into thinking that state interests and policies have an overriding impact on the enforcement of sister state judgments.

The Court's holding seems narrower than its overall analysis might suggest. It held that full faith and credit must be given to the determination the Virginia tribunal was empowered to make. Full faith and credit need not be given to what it did not have the power to make.[465] Thus, the Court, after examining the powers of the Virginia worker compensation tribunal, concluded that it was not a court of general jurisdiction and could not have determined applicable law questions.[466] The decision of the Virginia tribunal had certain, but not complete, preclusive effects on subsequent actions by an out of state tribunal. Since the tribunal did not have the powers to determine petitioner's rights under the law of the District of Columbia, they could not prohibit a new adjudication of those rights by the District of Columbia. This case, therefore, reaffirmed the long-standing tradition of *Fauntleroy* that the recognition of sister state judgments cannot be conditioned by the policies or interests of the enforcing state.

The rigor with which the U.S. Supreme Court expressed the mandatory requirements of the Full Faith and Credit Clause of the Constitution leaves very little, if any, room for state courts to maneuver. In several cases, California courts could not find any window to escape from the grip of *Fauntleroy* and its progeny. One of the earliest post-*Fauntleroy* California cases dealing with the public policy defense was the *Estate of Morris*.[467] In this case, a ninety-two year old California man adopted another sixty-one-year old Rhode Island man. While the adoption was valid in Rhode Island and created the status of father and son, its validity in California was doubtful because it allegedly conflicted with the declared policies of

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464. *Id.* at 277-81.

465. This was what the plurality opinion had to say about the demands of the Full Faith and Credit Clause requirements:

> Full faith and credit must be given to the determination that the Virginia Commission had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make. Since it was not requested, and had no authority, to pass on petitioner's rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights.

Id. at 282-83.

466. *Id.*

467. *In re* Morris' Estate, 56 Cal. App. 2d 715, 723, 133 P.2d 452 (1943).

California. Notwithstanding the contravention of California public policy, the California Court of Appeals held that full faith and credit must be given to the Rhode Island adoption decree and the status it created.[468]

In other cases, California courts expanded on this theme, holding that full faith and credit must be given other state judgments even when the cause of action was barred by local statute of limitations or was not actionable on other statutory grounds. For instance, in California, public policy prohibits the rendering of any deficiency judgment on a note secured by a trust deed or mortgage in the sale of certain types of real estate. This limitation on California courts could not justify the refusal by California courts to enforce a Colorado deficiency judgment.[469]

Similarly, foreign judgments based on gambling debts are entitled to enforcement even though such claims are not actionable in California on public policy grounds.[470] The most recent attempt by a judgment debtor to resist the enforcement of a sister state judgment on public policy grounds was in *Tyus v. Tyus*.[471] After a review of applicable precedents, the California Court of Appeals held that there is no public policy exception to the requirement that sister state judgments be recognized.[472]

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468. *Id.* at 723.

469. *See* United Bank of Denver v. K & W Trucking Co., Inc., 147 Cal. App. 3d 217, 195 Cal. Rptr. 49 (1983); Sanpietro v. Collins, 250 Cal. App. 2d 203, 58 Cal. Rptr. 219 (1967).

470. *See* Harrah v. Craig, 113 Cal. App. 2d 67, 247 P.2d 955 (1952).

471. 160 Cal. App. 3d 789, 206 Cal. Rptr. 817 (1984).

472. *Id.* The California Court of Appeals held enforceable a Texas judgment which mandated a United States serviceman to share his military retirement benefits with his wife even though the United States Supreme Court held such retirement benefits not subject to sharing by nonearning spouses. *See* McCarty v. McCarty, 453 U.S. 210 (1981). The Texas judgment had been entered prior to this decision but enforcement was sought after the *McCarty* decision. The California Court of Appeals likened the legal question raised to that of *Fauntleroy v. Lum*, relating to mistake of law which would not be sufficient basis for non-enforcement. The appellate court made emphatic statements about the obligation to give full faith and credit under the United States Constitution. The following is instructive of the court's views:

> Commentators and judicial opinions have pointed out that there is no public policy exception to the requirement that sister state judgments be recognized; there is only a limited exception where a sister state judgment contravenes an important interest of the state in which enforcement is sought.
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> The United States Supreme Court has established that the full faith and credit clause requires states to recognize the judgments of courts of sister states, according them full res judicata effect, even though the judgment would be in conflict with the policy of the enforcing state . . . .
>
> The Restatement of Laws does not provide an exception for the recognition of sister state judgments which are merely against the public policy of the enforcing state. (See Rest.2d Conf. of Laws, §§ 93, 103-121.)

Id. at 793.

Since the mandate of the courts in the decisions explained above is constitutional, the decisions are applicable to both federal and state courts. The rationale of *Fauntleroy* also has been held applicable to many equity decrees such as divorce decrees and decrees not involving payment of money.[473] Equity decrees are considered as equivalent to judgments and entitled to recognition and enforcement. Generally, child custody and alimony decrees are not considered to be final decrees because they are prospectively and retrospectively modifiable by the rendering court or even the enforcing court.[474] Any subsequent modification by the enforcing court is nevertheless consistent with the Full Faith and Credit Clause, which demands that the enforcing court give the same effect as the rendering court would to that judgment. However, in *Biewend v. Biewend*[475] it was held that even though the Full Faith and Credit Clause did not obligate the enforcement of alimony decrees for future payment of alimony, California courts could still enforce such decrees on comity principles. It was further held that such an enforcement would be subject to the public policy exception. In other words, when the requirements of the Full Faith and Credit Clause are not applicable, California courts may reject the enforcement of foreign judgments on public policy grounds.[476]

In the case of foreign penal and tax judgments, there are older cases stating that the constitutional mandate of the Full Faith and Credit Clause does not apply to them.[477] The penal laws of any country or state emanate from, and are generally believed to be based on, its fundamental public policies.[478] This position was induced

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473. *See* SCOLES & HAY, *supra* note 84, at 514, 930; *see also* Barber v. Barber, 323 U.S. 77 (1944); Sistare v. Sistare, 218 U.S. 1 (1909); Note, *Interstate Enforcement of Modifiable Alimony and Child Support Decrees*, 54 IOWA L. REV. 597 (1969); Fox, *The Uniform Reciprocal Enforcement Support Act*, 4 FAM. L. REP. 4017 (1978).

474. Notwithstanding the United States Supreme Court decision in Yarborough v. Yarborough, 290 U.S. 202 (1933), denying South Carolina the right to modify a Georgia child support judgment, a California court held in Elkind v. Byck, 68 Cal. 2d 453, 439 P.2d 316, 67 Cal. Rptr. 404 (1968), that California could modify a Georgia award and grant additional support to a New York child. Subsequent to the *Yarborough* decision, Georgia had adopted the Uniform Reciprocal Enforcement of Support Act which made modification possible. *See also* Halvey v. Halvey, 390 U.S. 610 (1947), where the court held that a Florida custody decree was modifiable by a New York court because it was modifiable where rendered. *See also* Worthley v. Worthley, 44 Cal. 2d 465, 283 P.2d 19 (1955); Kovacs v. Brewer, 356 U.S. 604 (1958).

475. 17 Cal. 2d 108, 109 P.2d 701 (1941).

476. *Id.* at 113.

477. *See, e.g.*, Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888); State of Oklahoma *ex rel.* West v. Gulf Colorado & Santa Fe Ry. Co., 220 U.S. 290 (1935).

478. *See* Leflar, *Extrastate Enforcement*, *supra* note 448.

by a statement made by Chief Justice Marshall that "the courts of no country execute the penal laws of another."[479] This statement was first applied to penal judgments, then to tax judgments. However, in modern times, the situation is slightly different. The U.S. Supreme Court has held that a foreign judgment is not to be denied enforcement merely because it is for the collection of taxes.[480] This opinion has been extended to administrative tax decisions.[481]

In the case of penal judgments, the U.S. Supreme Court is still to decide whether a foreign money judgment should be denied full faith and credit because it arose from a penal cause of action. In one case, the Court said that the Full Faith and Credit Clause did not affect the rule that one state cannot enforce the penalties of another state.[482] However, various authorities suggest that the modern trend is to accord recognition and enforcement to penal judgments similarly to tax judgments.[483] The test for determining enforceability of penal judgments was provided by the U.S. Supreme Court in *Huntington v. Atrill.*[484] According to the Court, the test is "whether it appears, to the tribunal which is called upon to enforce it, to be, in its essential charter and effect, a punishment of an offense against the public or a grant of a civil right to a private person."[485] The crucial point in the test is whether the claim originated from a penal statute. However, it is argued that with an increase in business and other economic regulations, foreign penal judgments based on such regulatory penalties, like tax judgments, might be enforceable.[486] It should be stressed that the subject is still unsettled and it will require an opinion by the U.S. Supreme Court to clarify the full faith and credit concerns in penal judgments.

B. *California Foreign Judgment Enforcement Statutes*

Foreign judgments have no automatic or direct effect in California.[487] A judgment creditor must bring an action on the judgment to obtain a new California judgment on which execution and enforce-

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479. *See* The Antelope, 23 U.S. (20 Wheat.) 66, 123 (1825).
480. Milwaukee County v. M.E. White & Co., 296 U.S. 268, 279 (1935).
481. SCOLES AND HAY, *supra* note 84, at 948.
482. Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).
483. SCOLES AND HAY, *supra* note 84, at 949.
484. 146 U.S. 657 (1892).
485. *Id.* at 668.
486. SCOLES & HAY, *supra* note 84, at 950.
487. *Id.* at 925.

ment may lie.[488] There are two ways in which the enforcement of a foreign judgment may be sought. Recognition may arise where the foreign judgment is pleaded as a defense to a suit by one of the parties.[489] In that case, the recognition is almost automatic, provided the rendering court had jurisdiction, since courts routinely accept evidence of the foreign judgment as terminating the defendant's obligations. The second type is an affirmative enforcement, where the judgment creditor wants to execute a foreign judgment against the local assets of the judgment debtor.[490] In that case, traditionally, an action had to be brought before the local court. In 1974, California adopted the Sister State Money Judgments Act,[491] which was designed to provide a simpler and more efficient method of enforcing such judgments. It provided a registration procedure that would avoid the necessity for pleadings and save time, while retaining all available defenses for the judgment debtor.[492]

A money judgment under section 1710.10 of the Act is that part of "any judgment, decree or order of a court of a state of the United States which requires the payment of money."[493] This section has been construed to include delinquent alimony payments reduced into a judgment.[494] Judgments that fall outside the definition of money judgments must be enforced in the traditional way. Section 1710.55 of the statute provides exceptions to the enforcement of sister state money judgments.[495] The grounds for non-enforcement include extrinsic fraud,[496] lack of jurisdiction, and others generally available to

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488. Little v. Stevens, 23 Cal. App. 3d 112, 99 Cal. Rptr. 885 (1972). RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 99-100 comment b (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 18 comment e (1982); *Uniform Enforcement of Foreign Judgments Act*, 72 A.L.R.2d 1255 (1960).

489. Scoles & Aarnas, *The Recognition and Enforcement of Foreign Nation Judgments: California, Oregon, and Washington*, 57 OR. L. REV. 377 (1978) [hereinafter Scoles & Aarnas].

490. *Id.*

491. CAL. CIV. PROC. CODE § 1710.10-.65 (West 1982 & Supp. 1989).

492. *See* Liebow v. Superior Court, 120 Cal. App. 3d 573, 575, 175 Cal. Rptr. 26 (1981).

493. CAL. CIV. PROC. CODE §§ 1710.10-.65 (West 1982 & Supp. 1989).

494. *Liebow*, 120 Cal. App. 3d at 579.

495. CAL. CIV. PROC. CODE, §§ 1710.10-.65 (West 1982 & Supp 1989).

496. *See* Estate of Sanders, 40 Cal. 3d 607, 710 P.2d 232, 221 Cal. Rptr. 432 (1985); *In re* Marriage of Modnick, 33 Cal. 3d 897, 905, 663 P.2d 187, 191 Cal. Rptr. 629 (1983); Caldwell v. Taylor, 218 Cal. 471, 476, 23 P.2d 758 (1933); Davi v. Belfiore, 153 Cal. App. 2d 325, 327, 314 P.2d 596 (1957); Comment, *Equitable Relief from Judgments, Orders and Decrees Obtained by Fraud*, 23 CALIF. L. REV. 79 (1934), all discussing that *extrinsic* fraud is a broad concept encompassing situations in which the fraud has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense. The Second Restatement of Judgments has abandoned the distinction between extrinsic and

judgment debtors.[497] Conspicuously absent in the list of defenses is the public policy exception. Unlike some equity judgments, where state courts may find some escape from the grip of *Fauntleroy*, money judgments seem to fall squarely within the ambit of that case and that of the Full Faith and Credit Clause of the Constitution.

In 1977, California amended its Sister State Money Judgments Statute to include the Enforcement of Foreign Country Money Judgments. Under section 1713.1, a foreign country money judgment is defined as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty or a judgment for support in material or family matters."[498] Foreign country money judgments are entitled to the simplified enforcement procedure discussed earlier. They are, however, also subject to their own category of defenses.[499] Of importance to our discussion is section 1713.4, which provides that such judgments may not be enforced on public policy grounds if the underlying cause of action or defense is repugnant to the public policy of California. The public policy exception recognized by this section is similar to that applied by California Courts under the comity principle in sister state cases where the Full Faith and Credit Clause is not applicable.[500]

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intrinsic fraud, as have the federal courts in Federal Rule of Civil Procedure 60(b), stressing the uncertainty and lack of consistency in its application. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 70 (1982). *See also* Comment, *Seeking More Equitable Relief from Fraudulent Judgments: Abolishing the Extrinsic - Intrinsic Distinction*, 12 PAC. L.J. 1013 (1981) (urging abolition of the distinction in California); Tom Thumb Glove Co., Inc. v. Kwang-Wei Han, 78 Cal. App. 3d 1, 144 Cal. Rptr. 30 (1978).

497. *See* Bierl v. McMahon, 270 Cal. App. 2d 97, 101, 75 Cal. Rptr. 473 (1969); 7 B. WITKIN, CALIFORNIA PROCEDURE, JUDGMENT § 194 (1985); 2 B. WITKIN, CALIFORNIA PROCEDURE, JURISDICTION § 231-41 (1985 & Supp. 1989); Farmers & Merchants Trust Co. v. Madeira, 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184 (1968); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, PARENT AND CHILD § 45 (1985 & Supp. 1989); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, JURISDICTION § 298 (1985 & Supp. 1989). *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 120 comment d (1971). *See also* Kubon v. Kubon, 51 Cal. 2d 229, 232, 331 P.2d 636 (1958) (plaintiff seeking to enforce foreign support order violated local custody and restraining orders).

498. CAL. CIV. PROC. CODE §§ 710.10-.65 (West 1982 & Supp. 1989).

499. *Id.* at § 1713.4 which contains at least six grounds for non-enforcement. *Id.*

500. *See* Biewend v. Biewend, 17 Cal. 2d 108, 113, 109 P.2d 701 (1941), where Justice Traynor stated that comity principles would apply subject to the public policy exception. *See also* Title Ins. & Trust Co. v. California Development Co., 171 Cal. 173, 152 P. 542 (1915), in which the California Supreme Court was presented with complex litigation concerning the enforcement of a Mexican judgment in California. The original dispute was over the rights of various parties in an irrigation project designed to divert the waters of the Colorado River through California and portions of Mexico for the irrigation of the Imperial County of California and a tract of land in Mexico. By design the canal was to run through Mexican territory. Under Mexican law a foreign corporation could not own the tract of land without

The enforcement of foreign country judgments in the United States is a complex subject which cannot be fully pursued here.[501] It is sufficient to mention that the only U.S. Supreme Court decision on the subject was in the 1898 case of *Hilton v. Guyot*.[502] In that case, the Court denied the enforcement of a French judgment because, under French law, a similar U.S. judgment would have been denied recognition and the merits of the claim would have been tried *de novo*. Thus, the Court recognized reciprocity as the basis for the enforcement of foreign country judgments.[503] Reciprocity under the ruling of *Hilton* does not bind state courts. Indeed, most courts have rejected the reciprocity doctrine.

The California Supreme Court in *Scott v. Scott*[504] decided that in the case of foreign country judgments state law is controlling unless there is some treaty or federal statute to the contrary. In *Scott*, an action was brought for declaratory judgment to determine the rights of the parties pursuant to two successive Mexican divorce decrees obtained by the husband. In a concurring opinion, Justice Traynor argued that foreign country judgments should be respected in California unless they were contrary to its public policy.[505] A foreign divorce decree may be contrary to California public policy "when the foreign jurisdiction has no legitimate interest in the marital status of the parties, when the sole purpose of seeking the divorce in a foreign court is to evade the laws of this state."[506]

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governmental consent. A Mexican company was set up for this purpose. In a dispute between the California development company and the Mexican corporation, two judgments were obtained allegedly through fraud. The judgments were obtained by confessions of the general manager of the Mexican corporation. As to whether the enforcement of the judgments in California should be resisted, the California Supreme Court employed equitable principles to resist enforcement. According to the Court:

> it would be to the last degree inequitable to permit the appellant to profit by the judgments thus obtained . . . . [W]e are of the opinion that the court below was authorized to go behind these proceedings and compel the parties seeking to benefit by them to make an equitable application of the assets which they had improperly acquired . . . . [H]aving jurisdiction of all the parties, the court acts upon them *in personam*, and restrains them from using their legal rights in a manner which would be contrary to equity and good conscience.

Id. at 207-08. While the Court did not explicitly employ the public policy exception, its discussion paralleled the use of public policy as equity and good conscience. *Id.*

501. *See* sources cited *supra* note 447.

502. 159 U.S. 113 (1895).

503. *Id.* at 163-64. *But see* the views of commentators Reese, *supra* note 448; Smit, *supra* note 448; and von Mehren & Patterson, *supra* note 447.

504. 51 Cal. 2d 249, 331 P.2d 641 (1958).

505. *Id.* at 256.

506. *Id.*

It is worthy of note that the public policy exception, as applied in foreign judgment cases, is similar to its use by the California courts in other conflict of laws cases discussed above. Essentially, the applicable California public policy test is similar to that suggested by von Mehren and Patterson.[507] That is, where the underlining cause of action is so contrary to the laws of California as to make the enforcement of the judgment terribly offensive to the fundamental policies of fairness, justice, and sound policy, California courts generally reject an enforcement request.[508] Thus, it has been held that mere difference in the law or the procedures of the two states would not be sufficient to trigger the public policy exception.[509] It must be stressed in conclusion that foreign country judgments, in addition to the public policy exception, face the same available defenses to enforcement as exist in other enforcement cases.

VI. Conclusion

Public policy has been mostly described in many pejorative metaphors. According to Justice Burrough, it is an unruly horse which will take its rider to where he knows not. To others it is more like Balaam's ass which is unlikely to take its rider anywhere. Judge Goodrich likened it to the ghost of Banquo that will unexpectedly make its appearance. These negative epiteths suggest that the concept is inherently uncontrollable by the courts and potentially a "dangerous" instrument for subverting the reasonable expectations of litigants. The impression is sometimes created that public policy is not just an unruly horse, but indeed an unbridled galloping steed. The objective of this study was to determine the true character of public policy in California conflict of laws and arbitration. It sought to investigate how the state of California, with its long history of liberal traditions, would define and use the concept in the judicial resolution of disputes.

From the analysis of the concept in California, a few concluding remarks can be made. It should be stressed immediately that contrary to some of the pejorative metaphors, public policy as used in Cali-

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507. von Mehren and Patterson, *supra* note 447, at 61.
508. *Id.*
509. Commentators take the view that the above difference between a state of the United States and a foreign jurisdiction is not likely to be considered a sufficient basis for the public policy exception to be used. *See, e.g.*, Scoles & Aarnas, *supra* note 489, at 385. *See also* Pentz v. Kuppinger, 31 Cal. App. 3d 590, 107 Cal. Rptr. 540 (1973) (rejection of public policy exception similar to rejection in choice of law cases in California).

fornia conflict of laws and arbitration disputes has neither been an unruly horse, an unbridled galloping steed, nor a flying Pegasus. It has been more like a chameleon which takes its colors from its environment, and infrequently like the ghost of Banquo. Defining the concept narrowly, the California Supreme Court has for decades tried to control the use of public policy to defeat the legal rights of litigants. The fluidity of the concept, however, has made its use by lower courts less restrained and predictable. In most conflict of laws disputes, the role of the public policy in the higher courts has been more restrained than one would have expected.

Traditionally, under the comity doctrine, the public policy exception was available to defeat foreign created rights. However, by adopting a narrow definition of public policy, requiring some threat to fundamental principles of justice, some prevalent conception of good, or deeply rooted traditions, California courts tended to reject the public policy defense where the enforcement of a foreign legal right would not undermine any fundamental values of society. Thus, in the choice of law area, the mere difference in law would not be sufficient for the use of the public policy exception. While public policy may play some role in the comparative impairment approach, that role is neither direct nor visible. Nonetheless, public policy may be embodied in the policy of the law which is taken into account in the comparative impairment approach. The recent public policy decision by the California Supreme Court in *Wong v. Tenneco* may be an aberration, but it signifies the elusiveness of the concept even in the hands of the highest court of the state.

In the areas of choice of law, forum selection clauses, and arbitration agreements, the situation is not entirely clear. In choice of law and choice of forum cases, the courts seem pulled in two directions. On the one hand, they continue to subscribe to the narrow definition of public policy, while at the same time adhering to the *Bremen* rationale that party autonomy should be respected. On the other hand, they are concerned about statutory rights and the evasive conduct of litigants. Without any federal controlling law, California is more likely to invoke the public policy exception to defeat a choice of law or forum clause if the choice was evasive of Californian substantive obligations, rights, or forum. Deliberate evasiveness may be viewed as not the proper exercise of party autonomy and, therefore, contrary to public policy.

The situation is vastly different and still controversial in the case of arbitration agreements. The FAA controls pre-dispute arbitration

agreements in maritime and interstate commercial transactions. All other arbitration agreements not covered in any other federal statute are governed by state law. State law public policy defenses would then control the challenges to enforcement of non-FAA agreements. With regard to arbitration agreements subject to the FAA, the existence of the public policy defense depends on the interpretation of section 2 of the FAA. Section 2 might be interpreted to be receptive of the public policy exception, but only under federal law. It has been demonstrated that such an interpretation would be inconsistent with the primary goals of Congress and the legislative history of the Act.

Congress intended to achieve two primary goals: (1) to remove the existing judicial hostility toward arbitration agreements; and (2) to provide equality of treatment between arbitration agreements and other contracts. To achieve these goals, Congress made arbitration agreements subject to the general defenses of other contracts. One of these defenses is the public policy defense. However, the basic defenses to contracts are questions of state law and not of federal common law. Given the limited goals of the FAA and equality of treatment objective, it is submitted that the public policy defense is a matter of state law. It must be stressed, however, that the governing state law must be neutral, non-discrimintory, or non-contradictory toward arbitration agreements. Furthermore, in view of the equality of treatment goals, party autonomy should exist in arbitration agreements similar to other contracts. Chosen state law, if non-discriminary, should govern subject to the state's basic and general public policy exception. This conclusion flows from the recent U.S. Supreme Court decision in *Volt Information Sciences* and the congressional intent behind the FAA.

In the case of international arbitration disputes, two important points need to be emphasized. First, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not explicitly provide for the public policy defense against the enforcement of arbitration agreements. Notwithstanding this, it is doubtful whether the public policy exception cannot be invoked in good faith in matters relating to the formation of an agreement to arbitrate. Second, the Convention provides in Article V (2)(b) for the public policy defense in the enforcement of foreign arbitral awards. U.S. courts have consistently held that the public policy defense under Article V (2)(b) must be narrowly construed. Federal courts have adopted the same definition of public policy in Article

V (2)(b) cases as has the California Supreme Court in other cases. The U.S. Supreme Court, without denying the public policy defense in challenges to arbitration agreements, has held that American courts should enforce international arbitration agreements under the terms of *Prima Paint*. If they have any concerns, they may review the awards subsequently for violations of public policy.

Public policy is less available as a defense in the enforcement of foreign judgments, particularly sister state judgments. In a line of cases, the U.S. Supreme Court has held that a state court cannot rely on its public policy to refuse the enforcement of a valid and final sister state judgment. This rule is not applicable to equity and foreign country judgments. Thus, public policy is available to defeat their recognition and enforcement. The courts of California appear to exercise some judicial restraint in the use of public policy against foreign country and equity judgments similar to what they do in the choice of law area.

Finally, these summary remarks should not be read to suggest that public policy is completely under the control of the courts of California. In its domestic use, public policy was, perhaps until the recent *Foley* decision, an unruly horse in the wrongful termination area. Also, it tends to surprise us ever so often in the conflict of laws area. Thus, its unpredictability suggests that it continues to be like the ghost of Banquo, appearing when least expected or sometimes becoming a galloping steed in the hands of an eager or overzealous rider. Besides, public policy is often used to fill in the gaps in the law and to protect society from the negative impact of individual conduct. The variety of cases in which it might be used suggests that it will continue to be more like a chameleon, taking on different colors and meanings depending on the circumstances of its use.